TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 238.

CARY W. BUTT, WILLIAM FLASH, AND THOMAS T. A. LYON, PARTNERS, AS BUTT, FLASH & LYON, APPELLANTS,

vs.

HENRY T. ELLETT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED NOVEMBER 12, 1872.

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United States circuit court, fifth circuit and district of Louisiana.

HENRY T. ELLETT,
vs.
BUTT, FLASH AND LYON. } 5681.

Bill in equity.—Filed November 6th, 1868.

To the judges of the circuit court of the United States for the said district of Louisiana:

Henry T. Ellett, of the city of Memphis, and a citizen of the State of Tennessee, bring this, his bill, against Cary W. Butt, William Flash, and Thomas A. Lyon, of the city of New Orleans, and citizens of the State of Louisiana. And thereupon your orator complains and says, that on the fourth day of September, A. D. 1866, William Sillers, who is a citizen of the State of Mississippi, was seized and possessed in his own right, in fee-simple, of a plantation and tract of land, known by the name of the "Asia" plantation, situated in the county of Bolivar, and State of Mississippi, composed of the following parcels, to wit: The west half of section seventeen, all of section eighteen, the north half of section nineteen, and the northwest quarter of section twenty, all in township twenty, range seven west; and the east half of the northeast
2 quarter of section ten, the southeast quarter of section twelve, and the east half of the west half of section thirteen, all in township twenty, range eight west.

And being so seized and possessed, the said Sillers, by a certain agreement or indenture, dated the first day of January, A. D. 1867, made between him, *and* the said Sillers, party of the first part, and one John H. Graham, who is a citizen of the State of Tennessee, party of the second part, did demise and let to the said Graham all the open land of the said Asia plantation, with the privilege of fire-wood, and other timber necessary for planting and agricultural purposes, for one year, commencing at the date of said agreement, and ending on the first day of January, A. D. 1868, at the annual rent of seven thousand dollars, one half thereof payable on the first day of October, eighteen hundred and sixty-seven, by the draft of said Graham in favor of said Sillers, on and to be accepted by the defendants, then co-partners, as commission merchants and factors, in the city of New Orleans, under the name and style of Butt, Flash and Lyon, and the other half payable on the first of November, eighteen hundred and sixty-seven, by the note of said
3 Graham in favor of said Sillers. And the said Graham did thereby covenant and agree to pay said rent promptly, in the manner aforesaid, at the maturity of said draft and note. And the said Graham, among other things, did also thereby mortgage and pledge all the crops raised on said Asia plantation in the year 1867 to the faithful performance of his said covenants, and did authorize the said Sillers and his assigns, without legal process, to seize upon and sell the same for cash, by giving thirty days' notice previous to the sale, by advertisement posted in three public places in said county of Bolivar, in case of any failure on the part of said Graham to perform his said covenants or either of them, the said sale to be for an amount sufficient to pay all and any arrearages of rent and expense of advertisement and sale; the surplus money, if any there be, to be returned and paid to said Graham or his representatives.

Your orator showeth that the said lease and mortgage, duly executed under the hands and seals of both parties, was duly acknowledged by them, according to the laws of the State of Mississippi, on the fourth day of February, A. D. 1867, before James A. Gaye, clerk of the
4 probate court of the county of Claiborne, in said State of Mississippi; and was duly filed for record, and recorded in the office of the clerk of the probate court of the county of Bolivar, in the last-mentioned State, on the 25th day of April, A. D. 1867, as by the several certificates endorsed thereon will more fully appear.

Your orator herewith files the said agreement or lease, and mortgage, marked Exhibit A, and makes the same a part of this bill, and refers thereto for a fuller statement of the terms and contents thereof.

Your orator showeth that about the eighth day of February, A. D. 1867, the said Sillers and said Graham met in the city of New Orleans, for the purpose of closing the agreement, by said Graham procuring the acceptance of the said defendants Butt, Flash & Lyon, for further security for one half of the said rent, and giving his note to said Sillers for the other half, in pursuance of the terms of the said agreement; and that the said agreement or lease, and mortgage, was then exhibited to the said defendants, Butt, Flash & Lyon, and was read and considered by them, and the terms thereof fully understood by them, and the counterpart of said agreement, intended for said Graham, was
5 delivered to and left with them, and still remains in their hands and possession; and with full notice and knowledge of the terms and intent of said agreement, and that the said Sillers had the first claim on all the crops for the payment of the whole amount of the rent, they agreed to accept, and did accept, the draft of said Graham for the sum of $3,500, payable to said Sillers on the first day of October, A. D. 1867, which draft has been paid and extinguished.

And the said Graham then delivered to the said Sillers his note, due the first of November, 1867, for the sum of thirty-five hundred dollars, being the other half of said rent, which note bears date Bolivar County, Miss., January 29th, 1867, and is filed herewith as Exhibit B, and made part of this bill.

Your orator showeth that the said mortgage and pledge, by the laws of Mississippi, became, and was, a lien and charge upon all the crops raised on the said Asia plantation in the year 1867, which lien commenced and took effect, as against all creditors of said Graham and purchasers from him, from the date when the same was filed for record as aforesaid, and as against the said defendants from the time when they had notice thereof as aforesaid.

6 Your orator showeth that the said Graham, under and by virtue of the said agreement and lease, took possession of said plantation, and occupied and cultivated the same during the year 1867, and planted, raised, and gathered there, during the said time, a crop of cotton amounting to forty-nine bales, of the average weight of four hundred and fifty pounds per bale, on which the lien and privilege of the said Sillers and of your orator attached under said mortgage.

Your orator showeth that on the fourth day of September, A. D. 1866, in the circuit court of the county of Claiborne, and the State of Mississippi, at a regular term thereof, he recovered a judgment against the said Sillers for the sum of ten thousand one hundred and three $\frac{89}{100}$ dollars, besides costs of suit, which judgment was duly recorded and enrolled on the judgment-roll of the said county of Bolivar, and State of Mississippi, on the fourteenth day of September, 1866, and thereby became a lien, from said last-mentioned date, upon all the property of the

said Siller' in the said county of Bolivar, on which judgment a writ of execution was issued on the nineteenth day of April, A. D. 1867, directed to the sheriff of the said county of Bolivar, commanding him to cause the amount of the said recovery, with interest and costs, to be
7 made of the goods and chattels, lands and tenements of the said Sillers, in the said county of Bolivar.

By virtue of which execution the said sheriff did, on the 28th day of April, A. D. 1867, levy upon and seize and take in execution all the right and title of the said Sillers in and to all the said lands hereinbefore mentioned and described, composing the said Asia plantation, and the said sheriff, after advertising the same for sale for the time and in the manner prescribed by the law of Mississippi, did offer the said land for sale on the third day of June, A. D. 1867, for cash, when your orator become the purchaser thereof, and the said lands were conveyed to him by the said sheriff, by deed dated the said third day of June, A. D. 1867, which deed is herewith filed, marked Exhibit C, and is made a part of this bill of complaint.

And your orator also files herewith a full transcript of the said judgment, execution, and returns of the sheriff thereon, marked Exhibit D, and makes the same a part of this bill.

And your orator showeth that at the time of said sale, the said Graham was in possession of the said land under the said lease, and
8 that the effect of said sale and conveyance, by the laws of Mississippi, was to substitute your orator in the place of said Sellers as the landlord of said Graham, who thereby became the tenant of your orator, to invest him with the legal title to the reversion of said land after the determination of said tenancy, and in the mean time to entitle your orator to receive all the rent accruing from said Graham for the use of said property, the day of payment of which had not arrived on or before the day of said sheriff's sale, but which became due and payable after that date.

Your orator showeth that no part of said rent had become due and payable at or before the time of said sheriff's sale, and therefore all the rent contracted to be paid by said Graham to said Sellers for said plantation became the property of and payable to your orator, and that the said Sellers, well knowing the legal effect of said sale, acquiesced therein, and endorsed the above-described note, filed as Exhibit B, and delivered the same to your orator, who ever since has had the same in his possession or under his control, and is now the legal holder thereof, and entitled to receive payment, and pursue all remedies in law or equity for its collection.

9 Your orator shows that in the fall of the year 1867, the said Butt, Flash & Lyon, the defendants, sent an agent to the said plantation, who remained there from the commencement of cotton-picking until the crop was gathered and prepared for market, and who, with the authority of the said defendants, and by their instructions, from time to time obtained from said Graham, and removed from said plantation, the cotton raised thereon, as the same was ready for shipment, and shipped the whole of said cotton to the said defendants at New Orleans, where the said defendants received and disposed of the same, and applied the proceeds to their own use, they, the said defendants, well knowing that the said cotton was raised during the year 1867, on the said Asia plantation, by said Graham, and that the same was bound by and subject to the lien and incumbrance of the said mortgage, for the security of the rent of the said plantation.

Your orator shows that the quantity of cotton so removed from said

plantation, and shipped and received by the said defendants at New Orleans, and applied as aforesaid, was forty-nine bales, of the
10 average weight of four hundred and fifty pounds per bale, and that said cotton was of the quality of middling, and was worth at the time of removal twenty-five cents per pound, and afterwards, and before the commencement of this suit, advanced the value of thirty-three cents per pound.

Your orator showeth that the said cotton was removed from said plantation and carried out of the State of Mississippi by the said defendants with the intent to defraud your orator, and to defeat this lien thereon by virtue of the above-mentioned mortgage; and your orator charges that, having removed the said cotton, and sold the same, and appropriated the same, or the proceeds thereof, to their own use, with full notice and knowledge of your orator's equitable title thereto, the said defendants became and were in equity trustees of said cotton for the use and benefit of your orator, and are liable to account to your orator in this court for the highest value thereof at any time between the removal and the final decree in this suit.

Your orator states that on being advised of the shipment of the
11 first twenty-seven bales of said cotton, and before he was informed of the particulars of said shipment, or of the shipment of a greater quantity, he, on the 25th day of November, 1867, sent a letter by mail, prepaid, addressed to the said defendants at New Orleans, notifying them of his claim to said cotton, and of his intentions to hold them accountable to him for the value of said cotton shipped to them; to which communication he has never received a reply.

He files herewith a true copy of the said letter, marked Exhibit E, and makes the same a part of this bill of complaint.

Your orator has since learned, and so charges the truth to be, that at the date of said letter the said defendants had actually taken away from said plantation, and shipped to their house in New Orleans, the whole forty-nine bales of the said cotton.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective oaths, and according to the best and utmost of their several and respective knowledge, remembrance,
12 information, and belief, full, true, direct, and perfect answer make to all and singular the charges and allegations in this bill of complaint contained, as if the same were herein repeated, and they and each of them, specially and particularly interrogated thereto,

May it please your honors, the premises considered, to grant your orator the writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said defendants, Cary W. Butt, William Flash, & Thomas Lyon, commanding them to appear before your honors in this honorable court, on a certain day therein to be contained, and to answer this bill, and that your honors will hold the said defendants as trustees of the said cotton for the use and benefit of your orator, and will cause an account to be taken of the principal, and interest at 6 per cent. per annum, due on said note, and also to ascertain the value of said cotton, and will decree that the said defendants do pay your orator the highest market value of the said cotton from the time of the removal thereof from the said plantation to the final decree in this suit, with interest from the date on which such value shall be fixed up to
13 the date of the decree, or a sufficient amount thereof to pay what may be due for principal and interest of said note, and all costs and expenses of this suit, or that your orator may have such other or

further relief as the nature of this case may require and to your honors may seem meet. And your orator will ever pray, &c.

(Signed) BRADFORD, LEA & FINNEY,
Solicitors.

Service accepted October 30th, 1868.
(Signed) W'M FLASH.

Service accepted November 2d, 1868.
(Signed) THO'S T. A. LYON,
For himself and C. W. Butt.

EXHIBIT A.—*Filed Nov'r 6th*, 1868.

This agreement, made on the 15th day of January, eighteen hundred and sixty-seven, between William Sillers of the first part, and John H. Graham of the second part, witnesseth:

That the said Sillers has agreed to let, and hereby does let, and the said Graham has agreed to take, and hereby does take, all the open land of the said Sillers known as the Asia plantation, in Bolivar County, Mississippi, with the privilege of fire-wood, and other timber
14 necessary for planting and agricultural purposes, for one year, commencing at this date, and ending on the 1st day of January, eighteen hundred and sixty-eight, at the annual rent of seven thousand dollars, one half thereof payable on the 1st day of October, eighteen hundred and sixty-seven, by the draft of the said John H. Graham in favor of the said Sillers on and to be accepted by Butt, Flash & Lyon, of the city of New Orleans, in the State of Louisiana, on presentment, and the other half payable 1st November, eighteen hundred and sixty-seven, by the note of said John H. Graham in favor of said Sillers.

And the said John H. Graham hereby consents and agrees to pay the rent promptly in the manner aforesaid, at the maturity of said draft and note; to permit said Sillers and his agents, or either of them, his heirs or assigns, to enter said premises at all reasonable hours in the day-time; to quit and surrender the said premises at the expiration of said term in a' good state and condition as reasonable use and wear thereof will permit; and that he will not assign, let, or underlet the whole or any part of said premises, or occupy the same for any business except for agricultural purposes, without the written consent of
15 said Sillers or his agents or assigns.

And the said John H. Graham hereby mortgages and pledges all the crops raised on said Asia plantation in the year 1867 to the faithful performance of these covenants, hereby authorizing the said Sillers or his assigns, without legal process, to seize upon and sell the same for cash, by giving thirty days' notice previous to the sale, by advertisement posted in three public places in said county of Bolivar, in case of any failure on the part of said John H. Graham to perform the said covenants, or either of them, said sale to be for an amount sufficient to pay all and any arrearages of rent, and expenses of advertisement and sale, the surplus money, if any there be, to be returned and paid to said John H. G*arner*, or his representatives.

Said Sillers reserves the tan-yard on said premises *until* the tan bark and bark-mill, vats and well, and right to work the same.

Said Sillers promises and agrees to let said John H. Graham have the refusal of said premises for the years 1868 & 1869, at the annual rent of eight thousand dollars, one-half to be paid at the commencement of each

term, and the balance at the end of each term, to be secured by
16 mortgage on the crops, provided the said John H. Graham shall notify said Sillers or his assigns in writing, on or before the 1st day of December next, before the commencement of such term, of his desire & intention to retain said premises on the terms aforesaid.

And the said John H. Graham promises & agrees to save sufficient good planting cotton-seed out of each crop, and at the expiration of this lease or renewal thereof, and the surrender of said premises, to deliver to said Sillers sufficient to plant said plantation.

Given under our hands and seals in duplicate, the day and year first above written.

(Signed) W'M SILLERS. [SEAL.]
(do.) JOHN H. GRAHAM. [SEAL.]

STATE OF MISSISSIPPI, *Claiborne County:*

Personally appeared before the undersigned, clerk of the probate court in and for said county, the above-named W'm Sillers and John H. Graham, and acknowledged that they signed, sealed, and delivered the foregoing instrument of writing on the day and year therein named,
17 and for the purposes therein stated, as their acts *acts* and deed.

Given under my hand and seal of office, at Port Gibson, on the 4th of February, 1867.

[SEAL.] (Signed) JA'S A. GAGE, *C'k.*

STATE OF MISSISSIPPI, *County of Bolivar:*

I, P. M. Davidson, clerk of the probate court in and for said county, do hereby certify that the within instrument of writing was filed in my office for record on the 25th day of April, 1867, and day duly recorded in deed-record book K, pages 395, 396, & 397, duly stamped with the U. S. internal revenue-stamp of $24.55, properly cancelled.

Given under my hand and seal of said court, at office, this 27th day of April, 1867.

[SEAL.] (Signed) P. M. DAVIDSON, *C'k.*
Per S. H. WHITE, *D. C.*

[U. S. int. rev. stamp, twenty-four $\frac{55}{000}$ dollars affixed and cancelled.]

EXHIBIT B.—*Filed Nov. 6th*, 1868.

[$3,500.]

BOLIVAR COUNTY, MISS.,
January 29th, 1867.

On the first day of November next I promise to pay W'm Sellers or order, thirty-five hundred dollars for rent of plantation.

(Signed) JOHN H. GRAHAM,
Manager of Butt, Flash & Lyon, of New Orleans.

(Written across the face:)
Secured by mortgage of this date.
(Signed) J. H. GRAHAM.

18 (Endorsed:) W'M SILLERS.

EXHIBIT C.—*Filed November 6th*, 1868.

This indenture made and entered into on this the 3rd day of June, A. D. 1867, between Robert M. Wilson, sheriff of Bolivar County, State of Mississippi, of the first part, and Henry T. Ellett of Claiborne County, and State aforesaid, of the second part.

Whereas the said R. M. Wilson, sheriff as aforesaid, by virtue of a writ of fieri facias to him directed from the circuit court of Claiborne County, issued by the clerk of said court, on the 19th day of April, A. D. 1867, commanding him to make of the goods, chattels, lands, and tenements of William Sillers, the sum of $10,103 $\frac{89}{100}$, which Henry T. Ellett had recovered in said circuit court against him for his damages, &c., with interest on the said sum at the rate of ten per cent. per annum from the 4th day of September, A. D. 1866; also the sum of $ for his costs, &c., did, on the 28th day of April, 1867, levy and advertise for sale on the first Monday in June then next, all the right & title of the defendant, William Sillers, in and to the following property, to wit:

19 The west half of section seventeen, all of section eighteen, the north half of section nineteen, and the northwest quarter of section twenty, all in township twenty, range seven west; also the east half of the northeast quarter of section ten, the southeast quarter of section twelve, and the east half, & the east half the west half of section thirteen, all in township twenty, range eight west, all in the county of Bolivar, and State of Mississippi, to satisfy the said execution & all costs. And whereas the said Wilson, sheriff as aforesaid, did, on the 3rd day of June, 1867, offer all of said lands for sale, after advertising according to law, the said Ellett then and there appeared and bid the sum of five thousand dollars for the said lands, and being the highest & best bidder therefor, and the said sum the highest sum bid, the said lands were struck off to the said Ellett, and he became the purchaser thereof: Now this indenture witnesseth that the said Wilson, sheriff, &c., in consideration of the premises, and of the said sum of five thousand dollars to him in hand paid by the said Ellett, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto

20 the said Ellett, his heirs and assigns forever, all the above-described lands, with their appurtenances, to have and to hold the same unto the said Ellett, his heirs and assigns, forever.

In testimony whereof the said Wilson, sheriff as aforesaid, hath hereunto set his hand and seal the day and year first above written.

(Signed) R. M. WILSON, *Sheriff.* [SEAL.]

THE STATE OF MISSISSIPPI, *Bolivar County:*

Personally appeared before me, P. M. Davidson, cl'k of the probate court in and for said county, the above-named R. M. Wilson, sheriff of said county, who acknowledged that he signed, sealed, and delivered the foregoing deed, as his act and deed, on the day and year therein mentioned.

Given under my hand and the seal of said court, at office, this the 16th day of July, A. D. 1867.

(Signed) P. M. DAVIDSON, *Clerk.*

STATE OF MISSISSIPPI, *Bolivar County:*

I, P. M. Davidson, clerk of the probate court in and for said county, do hereby certify that the foregoing deed, stamped $5, was filed

21 for record in my office August 5th, 1867, and recorded same day in deed-book "K," pages 480 & 481.

Given under my hand and the seal of said court, at office, this 5th day of August, A. D. 1867.

(Signed) P. M. DAVIDSON, *Clerk.*

EXHIBIT D.—*Filed November 6th*, 1868.

HENRY T. ELLETT
vs.
WILLIAM SILLERS.

Pleas before the honorable James M. Smiley, judge of the 1st judicial district of the State of Mississippi, at a circuit court began and held at the court-house in the town of Port Gibson, in and for the county of Claiborne, on the 1st Monday of September, A. D. 1866.

Be it remembered that heretofore, to wit, on the 4th day of September, 1866, the plaintiff in the above-stated case filed his declaration in the office of the clerk of the circuit court of said county in the words and figures following, to wit:

STATE OF MISSISSIPPI, *County of Claiborne:*

Circuit court of said county, September 1st, 1866.

Henry T. Ellett complains of William Sillers of a plea of trespasser, the case upon promises. For that whereas the said defendant, on the 5th day of April, 1858, at Port Gibson, made his promissory
22 note in writing of that date, and thereby promised to pay, on the fifth day of January the' next, to the plaintiff, or order, five thousand six hundred and seventy-two dollars and sixty cents, value received, to bear interest after maturity at ten per cent. per annum, which note remains wholly unpaid.

And whereas also the said defendant, on the 15th day of October, 1861, made his other promissory note of the last-named date, and thereby promised to pay, twelve months after date, to the order of the plaintiff, sixty-three $\frac{63}{100}$ dollars, with interest from date, value received, which last-mentioned note remains wholly unpaid.

Yet the defendant has not paid said several sums of money, although often requested, but has failed so to do, to the damage of said plaintiff of eleven thousand dollars, and therefore he sues.

(Signed) H. T. ELLETT.

[50-c. int. rev. stamp.]

(Copies of notes.)

PORT GIBSON, *April 5th*, 1858.

On the fifth day of January next I promise to pay Henry T. Ellett, or order, five thousand six hundred and seventy-two dollars and sixty-four cents, value received, to bear interest after maturity at ten per cent. per annum.

(Signed) W'M SILLERS.

23 PORT GIBSON, *October 13th*, 1861.

Twelve months after date I promise to pay to the order of Henry T. Ellett, sixty-three $\frac{63}{100}$ dollars, with interest from date, value received.

(Signed) W'M SILLERS.

Note due Jan'y 5th, 1859	$5,672 64
Int' to Sept. 4th, 1866, 7 y., 8 m., 10 days	4,348 99
Note due Oct'r 15th, 1862, int. from date	63 63
Int' to Sept'r 5th, 1866, 4 y., 10 m., 20 d'ys	18 63
	$10,103 89

And afterwards, on the 4th day of September, 1866, the following proceedings were had herein, to wit:

HENRY T. ELLETT
vs.
WILLIAM SILLERS.

This day comes the above defendant, in open court, in his own proper person, and enters his appearance to this action, and waives the issuance and service of process, and confesses judgment in favor of the said plaintiff for the sum of ten thousand one hundred and three dollars and eighty-nine cents damages, by reason of the premises in the declaration mentioned.

Therefore it is considered by the court, by and with the consent of the said defendant, that the said plaintiff do recover of the said
24 defendant the said sum of ten thousand one hundred and three dollars and eighty-nine cents for his damages, by reason of the premises in the said declaration mentioned, with interest thereon at the rate of ten per cent. per annum from this date, and costs of suit to be taxed, and have execution thereof.

And afterwards, to wit, on the 19th day of April, A. D. 1867, a writ of fieri facias upon said judgment emanated from said court, directed to the sheriff of Bolivar County, in the State of Mississippi, which, with the endorsements and sheriff's return thereon, is in the words and figures to wit:

The State of Mississippi to the sheriff of Bolivar County, greeting:

We command you that of the goods & chattels, lands and tenements of William Sillers, late of your county, you cause to be made the sum of ten thousand one hundred and three dollars and eighty-nine cents, which Henry T. Ellett, lately in *one* circuit court of Claiborne County, hath recovered against him for his damages which he has sustained by reason of the non-performance of a certain promise and presump-
25 tion by the said Sillers to the said Ellett, with interest on the said sum at 10 per centum per annum from the 4th day of September, 1866, until paid. Also the sum of $1 $\frac{75}{100}$ for his costs by him about his suit in that behalf expended, whereof the said Sillers is convicted, as appears to us of record, and that you have said moneys before the judge of said court on the 2d Monday of June next, to render to the said plaintiff for his damages and costs aforesaid, and have then and there this writ.

Issued the 19th of April, 1867.

[SEAL OF COURT.] (Signed) WALTER M'DOUGAL, *Clk.*

Costs to be paid by plaintiff, $1.75.

Return.

Received April 25th, 1867.

R. M. WILSON, *Sheriff.*

By virtue of the within writ of fieri facias, I have this day levied on and advertised for sale, on the 1st Monday in June next, all the right & title of the defendant, William Sillers, in and to the following property, to wit, the west half of section seventeen, all of section eighteen, the north half of section nineteen, and the northwest quarter of section twenty, all in township twenty of range seven west; also the east half of the northeast quarter of section ten, the southeast quarter of
26 section twelve, and the east half, and the east half of the west half of section thirteen, all in township twenty, range eight west, all in the county of Bolivar, in the State of Mississippi, to satisfy the said execution and all costs. Done this 28th day of April, A. D. 1867.

(Signed) R. M. WILSON, *Sheriff,*
By J. V. HARRIS, *D'y Sheriff.*

JUNE 3RD, 1867.—I have this day offered the lands described in the above levy for sale, after advertising according to law, and Henry T. Ellett being the highest and best bidder therefor, the same was struck off to him for the sum of five thousand dollars, and he became the purchaser.

R. M. WILSON, *Sheriff,*
By J. N. V. HARRIS, *D. S.*

The within execution is entitled to a credit of four thousand nine hundred and thirty-five $\frac{25}{100}$ dollars of plaintiff's money, for amount bid by plaintiff for property sold as above, after payment of sixty-four $\frac{75}{100}$ dollars per costs, &c.

W. T. ELLETT,
Plaintiff.

THE STATE OF MISSISSIPPI,
Claiborne County, ss:

I, Walter McDougall, clerk of the circuit court in and for said county, hereby certify that the foregoing pages contain a true and
27 correct transcript of the proceedings and judgment in the foregoing-stated case, together with the execution issued thereon, and the return and endorsements of the sheriff thereon, as the same now appears on file and of record in my office.

Given under my hand and seal of office this the 28th day of September, 1868.

[SEAL.] (Signed) WALTER McDOUGALL, *Clk.*

THE STATE OF MISSISSIPPI,
Claiborne County, ss:

I, James M. Smiley, sole presiding judge of the circuit court for the first judicial district of the State of Mississippi, (which said district includes the said county of Claiborne,) do hereby certify that Walter McDougall, whose signature is affixed to the above and foregoing certificate, is, and was at the time of signing the same, clerk of the circuit court of said county of Claiborne, duly elected, commissioned, and

qualified as such, and that his said attestation is in due form of law and made by the proper officer.

Given under my hand and seal this 28th day of September, A. D. 1868.

J. M. SMILEY. [SEAL.]

EXHIBIT E.—*Filed November 6th*, 1868.

PORT GIBSON, MISS., *November 25th*, 1867.

28 Messrs. BUTT, FLASH & LYON.

D'R SIRS: In June last I purchased at sheriff's sale the plantation in Bolivar Co., Miss., then belonging to W'm Sillers, and occupied by John H. Graham as his tenant, known as the Asia place. By virtue of this purchase all the rent which *which* Mr. Graham agreed to pay for the said plantation, and which had not then become due and payable, became due and payable to me, at maturity, instead of Mr. Sillers, and the note of Mr. Graham for $3,500.00, parcel of the rent, was accordingly transferred to me by Mr. Sillers. Besides the landlord's lien for rent, the payment of this note was secured by an express mortgage and hypothecation of "all the crops raised on the said Asia plantation in the year 1867." This mortgage was duly recorded in the proper county, and you had express notice of its existence when you accepted Mr. Graham's draft for the residue of the rent.

I am now informed that Mr. Graham has shipped twenty-seven bales of the cotton raised on the place during the current year (1867) to your house, and the object of this communication is to give you notice that I shall hold you accountable to me for the value of said cotton so

29 shipped to you, as the above-mentioned note of $3,500.00 is now past due and remains unpaid. You can examine into the validity of my claim, and if it is not admitted by you I shall be under the disagreeable necessity of undertaking to enforce it by suit. I shall be glad to hear from you on the subject as soon as you shall have come to a conclusion in regard to it.

Yours, very truly,

(Signed) HENRY T. ELLETT.

U. S. circuit court, December rules, 1868, Monday 7th.

From chancery-order book.

HENRY T. ELLETT,
vs.
BUTT, FLASH AND LYON. } No. 5681.

This day came the defendants, by their solicitors, Clarke, Bayne, & Renshaw, and entered their appearance to complainant's bill.

Answer.—Filed February 8th, 1869.

30 To the honorable the judges of the circuit court of the United States in and for the fifth circuit and district of Louisiana:

The joint and several answers of Cary W. Butt, William Flash, and Thomas A. Lyon, the defendants, to the bill of complaint of Henry J. Ellett, complainant.

These defendants, now and at all times hereafter saving and reserving to themselves, and each of them, all benefit, advantage of exception which can or may be taken or had to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them or any of them to make answer unto, they, these defendants, severally answering, say:

These defendants severally say that they, or any or either of them, to the knowledge or belief of the others, or other of them, do not know and have never been informed, save by the said complainant's bill, and cannot set forth, as to their belief or otherwise, whether William
31 Sillers, on the fourth day of September, 1866, was seized and possessed in his own right in fee-simple of a plantation and tract of land known by the name of the Asia plantation, situated in the county of Bolivar and State of Mississippi, and composed of the parcels in said complainant's bill stated.

And these defendants severally admit that said William Sillers and said John H. Graham did enter into the agreement marked A, filed as an exhibit to said plaintiff's bill; and they further severally admit that the same was acknowledged before James A. Gage, clerk of the probate court in the county of Claiborne, in the State of Mississippi. But they further severally say that they, or any or either of them, to the knowledge or belief of the others, or other of them, do not know and have never been informed, save by the said complainant's bill, and cannot set forth, as to their belief or otherwise, whether said Sillers was seized and possessed in his own right in fee-simple of said Asia plantation, at the time of making said agreement, or whether the
32 said agreement was recorded in the office of the clerk of the probate court of the county of Bolivar, Mississippi, on the 25th day of April, 1867.

And these defendants severally admit and aver the facts to be, and not otherwise, that said Sillers and said Graham came to the office of these defendants, in the city of New Orleans, some time in the month of February, 1867, and they both then and there exhibited to these defendants said agreement or lease; that these respondents read the same, and a counterpart thereof they received, and still have in their possession; that, at the time, these respondents being about to aid the said Graham in the furnishing of supplies to him to enable him to cultivate several plantations, called the attention of said Sillers to that portion of said agreement wherein and whereby the said Graham thereby mortgages and pledges all the crops raised on said Asia plantation, in the year 1867, and objected to the same. Whereupon the said Sillers stated, in substance, that the laws of Mississippi did not author-
33 ize a mortgage or pledge of that nature. And these respondents so having been informed by said Sillers, and also having been informed to the same effect from other sources, and as these respondents believed from sources learned in the law, considered and believed the said statement in said agreement as of no lawful effect, and that said Sillers waived the same. And defendants admit that they accepted said Graham's draft for the sum of three thousand five hundred dollars, payable to said Sillers on the first day of October, 1867, and that the same has been paid and extinguished. And these defendants severally deny that the interview between the said Sillers and said Graham, in the month of February, was as stated in said complainant's bill, or otherwise than as they have stated; that whether said interview

was on the eighth of said month they have no knowledge, but believe it was about that time.

And these defendants, further answering, say that it may be
34 true, as avowed by said complainant, for anything that these defendants, or either of them, knows to the contrary, that said Graham then delivered to said Sillers his note due the 1st of November, 1867, for the sum of $3,500.00 as the other half of said rent, and filed as Exhibit B; but these defendants, each of them, are *either* strangers thereto and cannot form any belief concerning the same.

And these defendants severally deny that the said agreement referred to in said complainant's bill as Exhibit A, and styled a mortgage and pledge by said bill, by the laws of Mississippi because a lien and charge upon all the crops raised upon said Asia plantation in 1867.

And these defendants, further answering, severally admit that the said Graham, under and by virtue of said agreement of lease, took possession of said Asia plantation and * occupied & cultivated the same during the year 1867, & planted * & raised and gathered thereon 49 bales of cotton; eleven bales thereof belonged to the freedmen who cultivated the place; but the defendants severally deny that a lien or privi-
35 lege in favor of said Sillers or said complainant attached under said agreement, which said complainant in his bill improperly discriminates as a mortgage.

And these defendants, severally answering, further say they know not and have not been informed, save by the said complainant's said bill, and cannot set forth, or any or either of them, to the knowledge or belief of the others or other of them, and cannot set forth as to their belief or otherwise, whether said complainant obtained a judgment against said Sillers, whether the same was recorded or became a lien upon the property of said Sillers, or a writ of execution issued there-

This reference approved.
F. A. WOOLFLEY, *Clerk.*

upon, or whether the sheriff * did seize and take in execution all the rights and titles of said Sillers in said Asia plantation, or whether the sheriff * legally sold the same, or the said complainant became the purchaser, or whether the said lands were conveyed to said complainant by deed of said sheriff dated the 3rd day of June, 1867.

And these defendants, severally answering, say that it may be true,
36 for anything these defendants, or either of them, know, that such sale and said deed, if made and executed, would give to said complainant all the rights of said Sillers as landlord of said Graham, but these defendants, and each of them, are utter strangers to all and every such matters, and cannot form any belief concerning the same.

And these defendants, further severally answering, admit that, on the 3rd of June, 1867, no part of the rent due by said Graham under said agreement was due and payable.

And these defendants, further severally answering, say that they or either of them, to the knowledge or belief of either of the others, do not know and have not been informed, save by the statement of said complainant's bill, and cannot set forth as to their belief or otherwise, whether said Graham, from any knowledge of any legal effect of the sale alleged, or whether he ever did endorse and deliver to said complainant the note mentioned as Exhibit B, or whether the said complainant is the legal holder thereof and entitled to receive payment and pursue all remedies in law or equity for its collection.

And these defendants, further answering, deny that they sent
37 to the said Asia plantation an agent, as avowed in said bill of complaint; but they aver the facts to be that these defendants,

having made to the said Graham large advances for the purpose of aiding in the cultivation of said Asia and other plantations, and feeling a deep interest in the proper adjustment of the accounts of said plantations with the freedmen and others employed thereon, suggested to said Graham that, he himself was unskilled in accounts, *that* he ought to have a person to aid him as a clerk and manager thereof; that said Graham acquiesced in said suggestion, and one C. E. Rulhe was sent to said Graham, who was so employed by said Graham; and defendants further aver that said Graham voluntarily, and without constraint on the part of these defendants, and as he was in duty bound to do, shipped to these defendants 49 bales of cotton, produce of said Asia plantation; that, of said product, a portion, being eleven bales thereof, belonged to the freedmen employed upon said Asia plantation; that in order to obtain the said product of said plantation, these'
38 defendants were compelled to pay them a balance due on their cotton, $245.43, in order to discharge the rights, privileges, and liens of said freedmen thereon; that, after said payment, the said cotton was openly, and without concealment or fraud, consigned to your respondents at New Orleans, as commission merchants, for the sale thereof; that, in the ordinary and lawful exercise of their rights, they sold the same in the open market; and that the same, after the ordinary and usual expenses of freight, labor, commissions, and storage, produced the nett sum of two thousand and sixty-two $\frac{9}{100}$ dollars, as will appear by the account-sales thereof, herewith filed as Exhibit X; that said nett sum was placed to the credit of the account of said Graham; and said cotton was received and sold as stated in said Exhibit X.

And these defendants, further answering, deny that they ever received any notice of said complainant's pretended claims be-
39 fore the receipt of his letter, dated the 25th November, 1867, herewith filed as Exhibit Y, which was received on or about last of November, 1867.

And these defendants, further answering, deny that said complainant has any lien or privilege or right of mortgage upon said cotton, the product of said Asia plantation, or that these defendants are liable to account to him therefor.

And these defendants, further answering, say that they are informed and believe, and so aver, that said Asia plantation was, during the season of 1871, overflowed by the waters of the river Mississippi, without the ability existing on the part of said John H. Graham to prevent the same, and that the said overflows were two in number, and caused by vis major, and that thereby, the said plantation was, by the then existing laws, and the product, rendered free from the payment of any rent, and any obligation for rent was, by the effect of said overflow, discharged, and so the rights (if any) said complainant had were extinguished.

40 And these defendants, further answering, say that on the 11th day of February, 1867, these defendants, as a commercial firm of the style, Butt, Flash & Lyon, entered into an agreement with John H. Graham, in writing, which is annexed as Exhibit Z, by which these defendants agreed to furnish stock and farm-tools, and provisions to said Graham to the extent of $5,500, besides accepting said Graham's draft for one-half rent of said Asia plantation, $3,500, in all $9,000, for the said Asia plantation, in addition to amounts then previously advanced for the same purpose. In consideration thereof said Graham therein and thereby obligated himself to ship to these defendants all the product of said plantation to reimburse these defendants for their advances of

every kind, and agreed to pay them the usual commissions for advancing or accepting, and for selling said crops, with all charges of every sort attending the sale, and interest, together with such compensation for use of stock, farm-implements, waggons, &c., of every sort, as might be agreed upon; and to secure the faithful performance of said
41 contract the said Graham further obligated himself to contract no debts or obligations of any sort to interfere with the faithful performance of the same; and he further expressly stipulated that all the crops raised on all the plantations comprised in said agreement, the said Asia plantation included, should by said agreement be pledged to the payment of the contemplated advances, and for the use of the stock, and all to be shipped to the defendants as they are ready for the market, together with such other stipulations as by said Exhibit Z will appear; that said agreement was signed, sealed, and acknowledged, on the said 11th day of February, 1867, before Andrew Hero, junior, commissioner of the State of Mississippi in and for the State of Louisiana, at New Orleans, by the said Graham and these defendants; that said agreement was duly filed for record on the 20th February, 1867, in the office of the clerk of the probate court of Bolivar County, of State of Mississippi, in which said county the said Asia plantation was situated, and the same was duly recorded on the day of February,
42 1867. And these respondents, further answering, say that on the first day of June, 1867, the said John H. Graham, as party of the first part, and these defendants as parties of the second part, and William G. Yerger, of the third part, made an indenture that witnessed that the said Graham, for and in consideration of the sum of ten dollars to him in hand paid by the said Yerger, and for other considerations hereafter mentioned, granted, bargained, sold, and delivered unto the said Yerger, as party aforesaid, all and singular the crops of corn and cotton then growing, and during the then current year to be grown and gathered on the Polk and Rawle, Asia, and Egypt plantations in Bolivar County, Mississippi, then occupied by the said Graham in trust, provided that whereas the said Graham was then jointly indebted to these defendants, for supplies and money advanced and furnished him for the purpose of making the crops aforesaid, in the sum of $\$27{,}554\frac{45}{100}$ dollars, as evidenced by his, said Graham's, then promissory
43 notes of date, said 1st day of June, 1867, payable to the order of these respondents at the Louisiana National Bank of New Orleans, for the following amounts and maturities as follows: One for $\$10{,}306\frac{82}{100}$, due 8th November, 1867; one for $\$11{,}000\ \frac{00}{100}$, due November 8th, 1867; and one for the sum of $\$6{,}233\frac{63}{100}$, due January 1st, 1868. And whereas, as an inducement to said advance and for the purpose aforementioned, the said Graham had agreed with these respondents to consign and forward to them, at the city of New Orleans, the crops of cotton aforementioned with all due dispatch, after and as rapidly as the same are ready in whole or in part for shipment; that if the said party of the first part, said Graham, should perform his stipulations, then the said indenture should be void, but in case he failed therein, then the said Yerger, as trustee, should take possession of said cotton and ship the same or cause it to be shipped to your respondent' at New Orleans, for the purpose of effectuating said trust, that the
44 said indenture gave to said trustee other powers. And these defendants, further answering, say that said indenture is a deed of trust by the laws of the State of Mississippi; that the same was duly recorded in the office of the clerk of the probate court of the county of Bolivar, on the 22d day of June, 1867, after having been duly acknowl-

edged by the said Yerger and said Graham. All which will more fully and at large appear by the Exhibit T, herewith filed.

And these respondents, further answering, aver that they made advances to said Graham, as set forth in three notes produced and filed as Exhibits G, H, L; that in order to meet said advances and the payment to the freedmen, as aforementioned, in good faith, and openly and without concealment and fraud, the said Graham shipped to these defendants 49 bales of cotton from said Asia plantation; that by reason of the agreement and deed aforesaid, the said Graham was bound in good faith so to do; that these respondents received the said cotton in
45 good faith and that by reason of the agreement and deed aforesaid and the advance aforesaid, they had a lien and privilege upon said cotton of a higher nature than all others, and especially said complainant.

And these defendants deny all charges, in said complainant's bill, of fraud; and they especially deny that said cotton was removed from said Asia plantation and carried out of the State of Mississippi, by these defendants, with the intent to defraud the said complainant and defeat his pretented liens, or that they are in any manner liable to him as trustees, or otherwise.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said bill charged, without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained, material or necessary for th*is* defendant' to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge and belief of these defendants or either of them; all which matters and things these defendants are ready
46 and willing to aver, maintain and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) W'M FLASH.
(do.) THO'S T. A. LYON.
(Signed) CLARKE, BAYNE & RENSHAW,
Solicitors for Def'd's.

Thomas A. Lyon and William Flash, defendants in the above cause, being duly sworn, depose and say that the averments of the said answer are true, as stated upon their own knowledge, and such as are upon information and belief they believe to be true.

(Signed) W'M FLASH.
(do.) THO'S T. A. LYON.

Sworn to and subscribed before me February 8th, 1869.
(Signed) F. B. VINOT, *Deputy Clerk.*

EXHIBIT X.—*Annexed to answer, and filed February 8th*, 1869.

Statement of cotton received and sold by Messrs. Butt, Flash
47 & Lyon, for account of John H. Graham, from the Asia plantation, in Bolivar County, Mississippi, and dates same were placed to the credit of John H. Graham' account.

When rec'd.		When credited.	
Oct'r 23, '67, nett sales of 10 bales cotton		Oct'r 25, '67	$468 08
Nov. 8, '67	10	Nov'r 13, '67	$460 90
" 20, '67	7	" 26, '67	$285 81
De'r 16, '67	14	Dec'r 21, '67	$521 78
" 17, '67	5	" 24, '67	$188 08
Jan'y 16, '68	3	Jan'y 29, '68	$138 25
	49 bales cotton.	Nett sales	$2,062 90

(Signed) BUTT, FLASH & LYON,
In liquidation.

NEW ORLEANS.

Account sales of ten bales cotton rec'd per steamer Henry Ames for a/c John H. Graham, and sold to I. Erallee.

(G) 10 bales cotton:

385, 433, 390, 385, 450, 388, 394, 386, 393, 362=3,966 lb.', @ 18¾.. $743 63

CHARGES.

Freight		20 00	
B. L. charges		219 92	
Storage		7 00	
River insurance		6 38	
Fire do.		1 06	
Special tax		74	
48 Brokerage		1 86	
Commissions 2½ %		18 59	
			275 55
			$468 08

NEW ORLEANS, *October 25th*, 1867.

Account sales of 25 bales of cotton received per steamer Henry Ames, Nov'r 8th, 1867, and sold for account of John H. Graham, of which ten were from the Asia plantation.

386, 358, 380, 405, 403, 352, 419, 420, 395, 384, 352, 407, 414, 400, 408, 383, 415, 398, 385, 392, 415, 427, 382, 394, 413=9,887 lbs., @ 17½ c $1,730 22

CHARGES.

Freight	50 00	
B. L. charges	442 18	
Drayage, storage, & labor	17 50	
River insurance	16 87	
Fire do.	2 16	
Special tax	1 73	
Brokerage	4 32	
Commissions	43 25	
		578 01
		$1,152 21

NEW ORLEANS, LA., *November 13th*, 1867.

The average of this lot is $46.09 per bale; ten of which came from the Asia plantation. Tax is $460.90.

49 Account sales of 18 bales cotton received from John H. Graham and sold for his account to L. G. De Lisle, of which (7) seven bales were shipped from Asia plantation, per st'r Henry Ames, Nov'r 20th, '67.

◇G◇ 18 bales:

440, 414, 383, 452, 409, 417, 364, 400, 400, 406, 344, 395, 380, 354, 370, 350, 385, 416=7,079 lb', @ 15¾		1,114 73

CHARGES.

Freight	36 00	
Charges per b. l.	289 93	
Baggage, storage, & labor	12 60	
River insurance	8 10	
Fire do	1 39	
Brokerage	2 78	
Special tax	1 11	
Commissions	27 87	
		379 78
Nett proceeds		$734 95

NEW ORLEANS, *November 26th*, 1867.

The average nett sales is $40.83 per bale, of which 7 times that amount was from the Asia plantation=$285.81.

Account sales of 39 bales cotton received per steamer R. E. Lee, December 16th, 1867, and sold for a/c of John H. Graham, of which number fourteen bales were shipped from the Asia plantation:

50	410, 377, 447, 377, 438, 443, 490, 404, 436, 373, 407, 436, 398, 370, 415, 364, 439, 320, 456, 422, 490, 350, 465, 420, 300, 307, 425, 410, 336, 335, 326, 509, 305, 311, 330, 340, 431, 469, 487=15,568 lbs., @ 14½c	$2,257 36

CHARGES.

Freight	78 00	
B. l. charges	226 83	
Gov't tax	379 67	
Drayage, storage, & labor	24 30	
Mending	2 50	
River ins'	24 37	
Fire do	3 82	
Special tax	2 25	
Brokerage	5 64	
Commissions 2½%	56 43	
		803 81
		$1,453 55

NEW ORLEANS, *Dec'r 21st*, '67.

The average of this lot is $37.27 each bale, of which 14 came from the Asia plantation, say=$521.78 ($521.78.)

Account sales of five bales cotton received per st'r Henry Ames, Dec'r 17th, '68, for account of John H. Graham, and sold to L. G. DeLisle.

(B) 5 bales cotton:

382, 320, 474, 464, 353=1,993, @ 14½ $288 98

CHARGES.

Freight		10 00	
	B. l. charges	75 62	
51	Drayage, storage, & weighing	3 50	
	River insurance	3 12	
Fire	do	43	
Special tax		29	
Brokerage		72	
Commissions		7 22	
			100 90
			188 08

NEW ORLEANS, *December 24th*, 1867.

Account sales of 3 bales cotton received per steamer Vicksburg, and sold to W. P. Ellison for John H. Graham. Rec'd Jan'y 16th, 1868.

3 bales:

386, 378, 396=1,160 lb., 17½ $203 00

CHARGES.

Freight	6 00	
B. l. charges	49 24	
Drayage, storage, weighing	2 10	
River insurance	1 12	
Fire do	51	
Special tax	20	
Brokerage	51	
Commissions	5 07	
		64 75
		$138 25

NEW ORLEANS, *Jan'y* 29, 1868.

EXHIBIT Y.—*Attached to answer, and filed February 8th*, 1869.

PORT GIBSON, MISS., *November 25th*, 1867.

52 Messrs. BUTT, FLASH & LYON.

D'R SIRS: In June last I purchased at sheriff's sale the plantation in Bolivar Co., Miss., then belonging to W. Sillers, and occupied

by John H. Graham as his tenant, known as the Asia place. By virtue of this purchase, all the rent which Mr. Graham agreed to pay for the said plantation, and which had not then become due and payable, became due and payable to me, at maturity, instead of Mr. Sillers, and the note of Mr. Graham for $3,500.00, parcel of the rent, was accordingly transferred to me by Mr. Sillers, besides the landlord's lien for rent. The payment of this note was secured by an express mortgage and hypothecation of "all the crops raised on the said Asia plantation in the year 1867." This mortgage was duly recorded in the proper county, and you had express notice of its existence when you accepted Mr. Graham's draft for the residue of the rent.

I am now informed that Mr. Graham has shipped twenty-seven bales of the cotton raised on the place during the current year (1867)
53 to your house, and the object of this communication is to give you notice that I shall hold you accountable to me for the value of the said cotton so shipped to you, as the above-mentioned note of $3,500.00 is now past due, and remains unpaid.

You can examine into the validity of my claim, and if it is not admitted by you, I shall be under the disagreeable necessity of undertaking to enforce it by suit. I shall be glad to hear from you on the subject as soon as you shall have come to a conclusion in regard to it.

Yours, very truly,

(Signed) HENRY T. ELLETT.

EXHIBIT Z.—*Attached to answer, and filed February 8th*, 1869.

These articles of agreement executed at New Orleans, this eleventh day of February, 1867, between the mercantile firm of Butt, Flash & Lyon, of said city, of first part, and John H. Graham, of State of Mississippi, of second part, witness: That whereas the said party of the second part has leased the several plantations in Bolivar Co., State
54 of Mississippi, known as the "Lake" plantation, property of Polk, the "Asia" plantation, property of Sellers, and the "Egypt" plantation, and has secured the necessary labor to cultivate the same, but has no stock, farm-tools, or implements, and no supplies of provisions, the said Butt, Flash & Lyon, of first part, hereby agree to furnish said stock and farm-tools and provisions to said party of second part, to the extent of forty-five hundred dollars for the Egypt plantation, fifty-five hundred dollars, besides accepting J. H. Graham' draft for ½ of rent of the Asia plantation, thirty-five hundred dollars, in all nine thousand dollars for the "Asia" plantation, and thirty-seven hundred and fifty dollars for the "Lake" plantation; all above in addition to the amounts already advanced for same purposes—say not to exceed in all twenty-one thousand two hundred and fifty dollars for all the above-named places.

In consideration of said stock, implements, and supplies furnished by said party of first part to said party of the second part, the said
55 John H. Graham of second hereby obligates himself to ship to said party of first part all the product of said plantations, to reimburse them for the advances of every kind, paying them the usual commissions for advancing or accepting, and for selling said crops, together with all charges of every sort attending the sale, and interest, together with such compensation for use of stock, farm-implements, waggons, &c., of every sort, as may be agreed upon; and to secure the faithful performance of said contract, the said party of second part further obligates himself to contract no debts or obligations of any sort to

interfere with his faithful performance of the same; and it is further expressly stipulated that all the crops raised on all the said plantations are hereby pledged for the payment of the contemplated advances & for use of the stock, and to be shipped to said Butt, Flash & Lyon as they are ready for market.

It is also stipulated that said party of second part shall not under any circumstances sell or mortgage, or otherwise dispose of, any of said
56 stock, tools, implements, supplies, &c., as before enumerated, nor do anything to embarrass the said property so as to prevent its absolute control and management by the said Butt, Flash & Lyon, party of first part, the same being wholly their property; and the said Butt, Flash & Lyon reserve to themselves, and are hereby authorized to annul this contract, and withdraw said stock, farm-tools, waggons, and unconsumed supplies, whenever in their judgment their interest may demand, without recourse to any legal process.

The said party of second part, John H. Graham, further stipulates that he will, on notice from said party of first part, promptly return to said party of first part all the stock, implements, tools, &c., as enumerated in receipt this day given by him for them, and that he will at all times keep same in good order and condition.

In witness whereof we have hereunto set our hand and seals, this eleventh day of February, 1867.

(Signed) JOHN H. GRAHAM.
(Signed) BUTT, FLASH & LYON,
By CARY W. BUTT.

Attest:
(S'gn'd) A. HERO, JR.

Attest:

(S'gn'd) SED. CENAS.

[$10.55 U. S. rev. stamp affixed & cancelled.]

STATE OF LOUISIANA,
City of New Orleans:

57 Personally appeared before me, Andrew Hero, j'r, a duly commissioned and authorized commissioner of the State of Mississippi in and for the State of Louisiana, officiating, as such, in said city of New Orleans, the above-named John H. Graham and Cary W. Butt, the latter acting for and on behalf of his firm of Butt, Flash & Lyon, and severally acknowledged that they signed, sealed, and delivered the foregoing agreement, on the day and year therein mentioned, as their voluntary act, and for the uses and purposes therein expressed.

As witness my hand and seal, at New Orleans, this eleventh day of February, A. D. 1867.

[SEAL.] (Signed) ANDREW HERO, JR.,
Commissioner.

I, H. T. Florey, clerk of the probate court, in and for the county of Bolivar, State of Mississippi, do hereby certify that the within instrument of writing appears duly recorded & acknowledged in my office, in deed-book "K," pages 445, 446, and 447; said instrument was recorded

by P. M. Davidson, clerk, on June 19th, 1867. Given under my
58 hand and seal of office this the fourth day of January, A. D. 1870.

(Signed) H. T. FLOREY, *Clk.*
(Signed) W. V. ONSLOW, *D. C.*

EXHIBIT T.—*Annexed to answer, and filed February 8th*, 1869.

This indenture, made and entered into this 1st day of June, A. D. 1867, between John H. Graham, of the first part, and Cary W. Butt, William Flash, and Thomas T. A. Lyon, merchants, and partners in trade in the city of New Orleans, Louisiana, under the firm-name and style of Butt, Flash and Lyon, of the second part, and W'm G. Yerger, of the third part, witnesseth: That the said party of the first part, for and in consideration of the sum of ten dollars, to him in hand paid by the party of the third part, the receipt of which is hereby acknowledged, and for the consideration hereinafter mentioned, has granted, bargained, sold, and delivered, and by these presents doth grant, bargain, sell, and deliver unto the said party of the third part, all and singular the crops of corn and cotton now growing, and during the current year to
59 be grown and gathered, on the Polk & Rawls, Asia, and Egypt plantations, in Bolivar County, Mississippi, now occupied by the said party of the first part; to have and to hold to the said W'm G. Yerger, and to his assigns and successors in office, in trust, nevertheless provided that, whereas the said party of the first part is justly indebted to the said parties of the second, for supplies and money advanced and furnished him for the purpose of making the crops aforesaid, in the just sum of twenty-seven thousand five hundred and fifty-four $\frac{45}{100}$ dollars, ($27,554.$\frac{45}{100}$,) as evidenced by his three promissory notes of even date herewith, payable to the order of the said party of the second part, at the Louisiana National Bank of New Orleans, for the amounts, and maturing as follows:

One for the sum of ten thousand three hundred and sixteen $\frac{82}{100}$ dollars, due November the eighth, A. D. 1867.

One for the sum of eleven thousand dollars, due November eighth, A. D. 1867.

One for the sum of six thousand two hundred and thirty-three $\frac{63}{100}$ dollars, due January first, A. D. 1868.

60 And whereas, as an inducement to said advance, and for the purposes aforesaid, the said party of the first part have covenanted and agreed with the parties of the second part, to consign and forward to them, at the said city of New Orleans, the crops of cotton aforesaid, with all due dispatch after, and as rapidly as the same are ready, in whole or in part, for shipment.

Now, if the party of the first part shall well and truly pay off and discharge the said several promissory notes, as they respectively become due and payable, and shall also faithfully comply with his covenants and agreements, as aforesaid, then this indenture to be void, but, in case he fail herein, in that event the said party of the third part is hereby authorized and required speedily to seize and take into his possession the said several crops of cotton, and ship or cause to be shipped to the said parties of the second part, at the said city of New Orleans, for the purpose of effectuating in good faith for the purposes of this trust, or, if so requested by the said parties of the second part,
61 he shall and may, after giving twenty days' notice of the time, place, and terms of sale, by advertisement thereof, posted at the

door of the court-house, in the said county of Bolivar, expose to sale to the highest bidder, for cash, the said several crops of cotton, or so much thereof as shall be of value sufficient to pay off and discharge the sum of money aforesaid, with all interest that may be due thereon, and the commissions that would properly be due and owing to the said parties of the second part, had the said crops of cotton been shipped to and sold by them, together with the expenses of foreclosing this trust.

In testimony whereof the parties of the first part and the third part have hereunto set their hands and affixed their seals the day and year first above written.

(Signed) JOHN G. GRAHAM. [SEAL.]
(Signed) W'M G. YERGER. [SEAL.]

STATE OF MISSISSIPPI,
Bolivar County:

62 Personally appeared before me, P. M. Davidson, clerk of the probate court of said county, the within-named John H. Graham, who acknowledged that he signed, sealed, and delivered the within and foregoing deed and instrument of writing on the day and year therein mentioned as his act and deed.

Given under my hand and seal of said court, at office, this twenty-second day of June, eighteen hundred and sixty-seven.

[SEAL.] (Signed) P. M. DAVIDSON, *Clerk.*
By S. H. WHITE, *D. Clk.*

STATE OF MISSISSIPPI,
Washington County:

Personally appeared before me, T. B. Gray, clerk of the probate court of the county aforesaid, the above-named W'm G. Yerger, who acknowledged that he signed, sealed, & delivered the foregoing instrument on the day and year therein mentioned as his act and deed.

Given under my hand and official seal this 21st day of June, A. D. 1867.

[SEAL.] (Signed) T. B. GRAY, *Clk.*
(Signed) By E. J. COMSTOCK, *D'y Clk.*

[28 dollars int.-revenue stamps affixed & cancelled.]

STATE OF MISSISSIPPI,
Bolivar County:

63 I, P. M. Davidson, clerk of the probate court in and for said county, do hereby certify that the annexed and foregoing instrument of writing, duly stamped with the U. S. rev.-stamp of $28.00, has this day been recorded in my office, according to law.

Given under my hand and seal of said court, at office, this 22d day of June, A. D. 1867.

[SEAL.] (Signed) P. M. DAVIDSON, *Clk.*
(Signed) By S. H. WHITE, *D'y Clk.*

EXHIBIT G.—*Annexed to answer, and filed February 8th,* 1869.

$6,237.63.] BOLIVAR COUNTY, MISSISSIPPI, *June 1st,* 1867.

On the first day of January, 1868, I promise to pay to the order of Butt, Flash & Lyon, commission-merchants in the city of New Orleans, State of La., at the Louisiana National Bank of New Orleans, the sum of sixty-two hundred and thirty-seven $\frac{63}{100}$ dollars, value received in

supplies and money to enable me to make a crop, without which it would have been impossible for me to have worked my plantations this year. I desire this note to operate as a *lein* on my crops grown on the Polk, Asia, and Egypt plantations, in Bolivar County, Mississippi, and request that the be recorded as the law requires.

(Signed) JOHN H. GRAHAM.

Due 1-4 Jan'y, 1868.

(Written across the face in red ink:)

STATE OF MISSISSIPPI,
Bolivar County:

Secured by mortgage duly stamped and recorded in my office June 21st, 1867.

(Signed) P. M. DAVIDSON, *Clk.*

EXHIBIT H.—*Annexed to answer, and filed February 8th, 1869.*

$10,316.82.] BOLIVAR COUNTY, MISSISSIPPI, *June 1st*, 1867.

On the 8th day of November next I promise to pay to the order of Butt, Flash & Lyon, commission-merchants in the city of New Orleans, State of Louisiana, at the Louisiana National Bank of New Orleans, the sum of ten thousand three hundred and sixteen $\frac{82}{100}$ dollars, value received from them in supplies and money to enable me to make a crop, without which it would have been impossible for me to have worked my plantations this year. I desire this note to operate as a *lein* on my crops grown on the Polk, Asia, and Egypt plantations, in Bolivar County, Miss., and request that the same be recorded as the law requires.

(Signed) JOHN H. GRAHAM.

Due 8-11 November, '67.

(Written across the face in red ink:)

STATE OF MISSISSIPPI,
Bolivar County:

Secured by mortgage duly stamped and recorded in my office June 21st, 1867.

(Signed) P. M. DAVIDSON, *Clerk.*

65 EXHIBIT I.—*Annexed to answer, and filed February 8th*, 1872.

$11,000.] BOLIVAR COUNTY, MISS., *June 1st*, 1867.

On the eighth day of November next, I promise to pay to the order of Butt, Flash & Lyon, commission-merchants, in the city of New Orleans, State of Louisiana, at the Louisiana National Bank of New Orleans, the sum of eleven thousand dollars, value received from them in supplies & money to enable me to make a crop, without which it would have been impossible for me to have worked my plantations this year. I desire this note to operate as a *lein* on my crops grown on the Polk and Egypt plantations, in Bolivar County, Miss., and request that the same be recorded as the law requires.

(Signed) JOHN H. GRAHAM.

Due 8-11 Nov., '67.

(Written across the face in red ink :)

STATE OF MISSISSIPPI,
Bolivar County :

Secured by mortgage, duly stamped, and recorded in my office June 21st, 1867.

(Signed) P. M. DAVIDSON, *Clerk.*

Replication.—Filed May 3rd, 1869.

United States circuit court for the fifth circuit and district of Louisiana.
In chancery.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON.

66 The replication of Henry T. Ellett, complainant, to the answer of Butt, Flash & Lyon, defendants.

This repliant, reserving to himself all exceptions to the manifold insufficienc'es of the said answer, for replication, saith that he will aver and prove his bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer is uncertain, untrue, and insufficient to be replied unto by this repliant; without this that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied is true, all which matters and things this repliant is, and will be, ready to prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

(Signed) BRADFORD, LEA & FINNEY,
Solicitors for Complainant.

Commission for complainants issued September 17th, 1869; returned and filed February 14th, 1870.

Circuit court of the United States for the fifth judicial circuit,
67 holding sessions in and for the district of Louisiana.

To L. N. Baldwin, esq., or any justice of the peace in Port Gibson, Mississippi:

Know ye that, reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call and cause to come before you William Sillers, S. S. Noelly, Richard Parkinson, and others, and them duly examine on the annexed interrogatories on oath touching and concerning certain matters and things in a case now depending in the said court, wherein Henry T. Ellett is plaintiff, and Butt, Flash and Lyon are defendants, and the same examinations, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause, and also send this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New Orleans,
68 this 17th day of September, anno Domini 1869, and the 94th year of the Independence of the United States of America.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *Dy Clk.*

Interrogatories propounded to witnesses under and annexed to commission.

HENRY T. ELLETT
vs. } No. . U. S. circuit court.
BUTT, FLASH & LYON.

Interrogatives to be propounded to William Sillers, Richard Parkinson, and other witnesses for complainants residing in Port Gibson, Mississippi, to be examined under the annexed commission.

1st. What is your name and residence? Do you know the parties to this suit?

2d. (To William Sillers only:) Had you any communication or conversation in the year 1867 with the defendants herein, in reference to a certain agreement or indenture dated the 1st January, 1867, by which
69 you leased to John H. Graham the "Asia" plantation, in Bolivar County, Mississippi, for the rent named therein? If yea, please state when, where, and with whom said communication or conversation was made, or took place. Had or had not said defendants or either of them any opportunity of becoming acquainted with the terms and stipulations of said agreement or indenture? If yea, state what opportunities, and whether or not said defendants or either of them availed of them. If you say any such communication or conversation took place, state whether said communication or conversation related to the mortgage or pledge of the crops to be raised on said plantation in the year 1867, contained in said agreement or indenture; and, if yea, state all that was said in said communication or intercourse relative to said mortgage or pledge, by whom it was said, what led to what was said on that subject, and all the circumstances connected therewith. State the whole of said communication or intercourse.

3rd. (To William Sillers alone:) In said communication or
70 intercourse was any proposition or agreement made for the waiver of said mortgage or pledge?

4th. (To all the witnesses:) Do you know C. E. Ruhle? Have you any knowledge of his presence on said plantation in the year 1867, at the time of the shipping or removal therefrom of the crop made on that place that year? If yea, state when he was there, for what purpose he was there, what he did while he was there, and if he was there for or in behalf of any person or persons, state who were said persons, and all you know relative to the subject of this interrogatory fully and particularly.

5th. (To William Sillers:) At the date of the execution of said agreement or indenture, who was the owner of said plantation? Who was the owner thereof on the 3rd of June, 1867?

7th. Do you know or can you set forth any matter or thing which may be a benefit or advantage to the parties at issue in this case or either of them, or that may be material to the subject of this your examination, or the matter in question in this cause? If so, set
71 the same forth fully and at large in your answer.

6th. (To William Sillers:) In said agreement or indenture there is a reference to a promissory note stipulated to be furnished by John H. Graham; state whether said note was furnished by said Graham to you. Did you ever transfer said note to any one? If yea, state when and to whom you transferred it, and what was the consideration or cause of said transfer. Who is now the holder of said note?

(Signed) LEA, FINNEY & MILLER,
Solicitors for Compl'ts.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681. U. S. circuit court.

The defendants, reserving all exceptions to the interrogatories filed by complainant, and specially excepting to the examination of any witness not named in the interrogatories or commission, propound the following

Cross interrogatories:

1st. (To William Sillers:) If in answer to the 2d interrogatory you speak of an interview with the defendants, or either of them,
72 state when, where, and with which of defendants said interview took place. Who were present thereat? Have you stated all that occur'ed at said interview? If you exhibited said lease to the defendants, or either of them, did they not object to that part of said lease wherein Graham pledged and mortgaged the crops raised on Asia plantation in the year 1867, and did you not reply in substance, or to the effect, that such a mortgage or pledge, by the laws of Mississippi was not authorized, and that, therefore, it was of no avail, or as if not written? Was not such a statement made by you, and was it not of a character to induce defendants to consider it as waived? Was it not necessary in order to cultivate the said Asia plantation that Graham should obtain large advances, and were you not aware that the defendants had made and were about to make him large advances to that end, and did you not go with him to them to shew said lease to them, and in order to aid him in inducing them to continue his business?

73 2d. (To all the witnesses:) Were you present at the Asia plantation during 1867? If yea, when, how long, for what purpose? How do you know the truth of what you state? Did you see and observe the same personally, or has some one informed you of what you state? Was the Asia plantation overflowed by the waters of the Mississippi River during the year 1867? If so, when, and for how long a time?

3rd. Do you know any other matter or thing that can aid the defendants herein? If yea, state the same fully and particularly.

(Signed) CLARKE, BAYNE & RENSHAW,
Solicitors for Def'd'ts.

Affidavit and order for commissions waived. And it is agreed that the commission shall be executed by any justice, waiving proof of his capacity, or by any individual.

(Signed) CLARKE, BAYNE & RENSHAW,
Sol's for Def'd'ts.

In the circuit court of the United States for the fifth judicial district, holding sessions in and for the district of Louisiana.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON.

74 The depositions of William Sillers and Sidney S. Neely, taken by me in the town of Port Gibson, county of Claiborne, State of

Mississippi, on the 8th day of February, A. D. 1870, on behalf of the complainant, in pursuance of the annexed commission to me directed, and upon the interrogatories and cross-interrogatories thereto attached, to be read in evidence in a suit depending in the circuit court of the United States for the fifth judicial district, holding sessions in and for the district of Louisiana, in which Henry T. Ellett is complainant, and Butt, Flash and Lyon are defendants, the said William Sillers and Sidney S. Neely being respectively of the age of fifty years and upwards, and first by me carefully examined and *contained*, and sworn to testify the whole truth in answer to said interrogatories and cross-interrogatories, depose and say as follows, to wit:

The said witness, William Silliers, being by me examined, deposes as follows:

Deposition of William Sillers.

1st. To the first interrogatory he answers and says: My name
75 is William Sillers, and I reside in the county of Claiborne, State of Mississippi. I know Henry T. Ellett, the complainant in this suit, and had a slight acquaintance with the defendants in the month of February, A. D. 1867, and have not seen either of them since that time.

2d. To the second interrogatory he answers and says: I had several conversations and interviews with the defendants, in their counting-room, in the city of New Orleans, and State of Louisiana, in the month of February, 1867, in reference to a certain agreement or indenture dated 1st of January, 1867, by which I leased to John H. Graham the Asia plantation, in Bolivar County, Mississippi, for the rent therein named. That agreement or indenture was signed and executed by said Graham and myself in duplicate, he taking one copy and I the other. The copy which I took, duly acknowledged by each of us, I hereto attach, marked Exhibit A, U. S. circuit court, No. 5681, filed with bill, November 6th, 1868., F. B. Vinot, d'y cl'k, the same having been handed to me. It is one of the two original genuine copies executed by
76 John H. Graham and myself. My conversations above alluded to were chiefly if not exclusively with the defendant Lyon, who seemed to be attending to the business with me. The defendants had abundant opportunity of becoming acquainted with the terms and stipulations of said agreement or indenture, and did know all about it, for I delivered to, and left with, defendant Lyon, on or about the 6th of February, 1867, in their counting-room, aforesaid, at Graham's request, his (Graham's) copy of said agreement or indenture, which copy said Lyon received, and read, and retained in his possession, and which copy Graham sent by me to defendants. Many of the communications, conversations, and interviews run'ing through four or five days between defendant Lyon and myself had relation to said agreement or indenture. When I first handed it to the defendant Lyon, on or about the 6th February, A. D. 1867, I also presented to him Graham's drafts on defendants in my favor, one for $3,500.00 for one-half the rent of the Asia place, due October the 1st, 1867, and other drafts for corn, stock, farming-utensils, &c., bought by said Graham on said Asia
77 place. Defendant Lyon declined at first to honor Graham's said drafts on them in my favor, saying that they would telegraph him to come to the city, and that they must first talk with him before honoring the drafts. About two or three days afterwards he arrived in the city, and they then confirmed his arrangement with me by honoring all of his drafts drawn on them in my favor. Our business conver-

sation had relation to the drafts, and to the agreement or indenture generally. I don't remember that the mortgage or pledge of crops to be raised on the Asia place, in 1867, contained in said agreement or indenture, was spoken of particularly or special'y. The difficulty with defendants, as far as I discovered, seemed to be about having Graham's drafts in my favor. Mr. Lyon said that they had not authorized Graham to lease the Asia place or draw these drafts, and we had several talks about it. In one of them he proposed that I should let
78 him take Graham's place in the agreement, and become my lessee. I told him he might do so if he would give me his draft for the rent, accepted by the house. He said that would look more like they were an agricultural than a commercial firm. He then asked me if I would allow him to sublet from Graham. I could not see his object in this proposition, and I told him I would take it under advisement. But before I got ready to reply to him the drafts were honored, and I never replied to it. He and I talked, also, of matters and things generally, and about the business arrangements between commission merchants and planters then being made, the purport of which I do not now recollect.

3rd interrogatory he answers & says: In said communications or interviews there was no proposition or agreement made for the waiver of said mortgage or pledge. If any such proposition had been made to me I should have declined it. I took the mortgage on the
79 crops because it was all the security I could get for the $3,500.00 note of Graham, refer'ed to in the agreement or indenture. I tried to have the stock and farming-utensils that Graham brought on the Asia place included in the mortgage; but Graham said the title to them was held by defendants for their security, and declined. If I had waived said mortgage or pledge, I should have waived the only security I had for the rent, and which I took especial pains to obtain.

To the 4th interrogatory he answers and says: I went to Bolivar County, Mississippi, in the month of November, 1867. I had before that time endorsed and delivered to the complainant, Graham's said note of $3,500.00, given in part for the rent of said Asia place in the year 1867. As I was about starting, complainant asked me to take this note with me and collect it for him if I could. Accordingly I called at the Asia place while there and met C. E. Ruhle, and was introduced to him by Graham. I do not know at what precise date he went to the Asia place, or how long he remained there. He told
80 me he was there as the agent and attorney in fact of defendants to settle their business with said John H. Graham, and to receive from him and ship to them the cotton-crop raised by him on said Asia place. He told me he held defendants' power of attorney giving him authority to act for them in that behalf. He took from his pocket and showed me, and I read them, two steamboat bills of lading of cotton he had just shipped to defendants, and he said it was part of the crop raised on the Asia place in 1867. I spoke to him about the $3,500.00 note and told him it was for part of the rent of the Asia place and had not been paid, and that there was a lien on the crops raised on the place for its payment, and that the note had been transfer'ed to complainant, and that I was the agent for its collection. There were then some ten or twelve bales of cotton at the gin on the place. Ruhle proposed to me in reference to the rent and $3,500.00 note that I
81 would let him ship the balance of the cotton on the place to the defendants, subject to the question of rent, and let them and complainant settle the question of rent. I suspected from Ruhle's con-

versation that the defendants would claim the right to appropriate the proceeds of the cotton to themselves, and I regarded this as a proposition to place defendants in possession of the entire cotton-crop, and to transfer by consent all matters of dispute and litigation that might arise between complainant and defendants from Bolivar County, Mississippi, to New Orleans, and I declined to consent to it. Graham was present at this conversation. It took place on the Asia plantation.

To the 5th interrogatory he answers and says: I was the owner of said Asia plantation at the date of the execution of said agreement or indenture, and I was the owner thereof on and up to the 3rd day of June, A. D. 1867, at which time it was sold by the sheriff of Bolivar County, Mississippi, under execution of a judgment against me
82 in favor of complainant, and bought by said complainant at said sale.

To the 6th interrogatory he answers and says: The promissory notes stipulated in said agreement or indenture to be furnished by said John H. Graham for $3,500.00 in my favor and due 1st November, 1867, was by him executed and delivered to me on the 29th day of January, 1867, and bears that date, and is signed by him with the words added by him to his signature, "Manager for Butt, Flash & Lyon, of New Orleans." I did not know or regard him as such manager, and did not take the note from him as such manager, and I regarded the words added to his signature as a mere fancy of his own. I contracted with him individually, did not know defendants in the transaction, and considered I was taking his note. He also wrote across the face of the note the words "Secured by mortgage of this date," and signed his name, "J. H. Graham," thereto. This note was made by Graham pursuant to the stipulation, and upon the consideration named in the said agreement or indenture, and is the only one ever made by him in my favor, and
83 is the note refer'ed to in said agreement or indenture. The statement of Graham written across the face of the note, that it was secured by mortgage of the date of the note, was intended to refer and does refer to said agreement or indenture; and it was intended by said indorsement to connect said note with said agreement or indenture as the note therein refer'ed to; that is the only agreement or indenture or mortgage that Graham ever gave me, and the indorsement across the face of the note, making a discrepancy between the date of said agreement or indenture and the date of said note, is an inaccuracy and a mistake of date. I transfer'ed said note to complainant shortly after the third of June, 1867, and he is now the holder thereof. The consideration of the note is the rent of the Asia place for the year 1867, and inasmuch as complainant became the purchaser of said place on the 3rd of June, 1867, as stated in answer to 5th interrogatory, I considered that he was entitled to the rent thereof for that year, and entitled to the note, and I therefore upon that
84 consideration transfer'ed to him said note, and gave him up said agreement or indenture. I annex said note hereto, marked "Exhibit B," U. S. circuit court, No. 5681, filed with bill Nov'r 6th, 1868, F. B. Vinot, d'y cl'k," the same having been handed to me.

To interrogatory 7th he answers and says: At the time I delivered Graham's copy of said agreement or indenture to defendants, and presented his said draft on them for $3,500.00 in my favor for their acceptance, on or about the 6th day of February, A. D. 1867, as above stated, I also shewed them the aforesaid note of Graham in my favor for $3,500.00, and Mr. Lyon remarked to me that Graham was no manager of theirs. I told him I supposed not, and that I had not accepted the

note from him under any such idea, and that I presumed it was a mere fancy of his to sign himself in that way; and further the said deponent saith not in answer to this interrogatory.

To cross-interrogatory No. 1 he answers and says: As I have previously stated, I had several interviews with the defendants in
85 relation to my business with Graham. Those interviews were chiefly, if not exclusively, with the defendant Lyon, who seemed to be attending to this kind of business of the house; but I think Graham was present at some of these interviews. I do not remember that any one else ever was present or heard them. They took place in defendants' office. I have stated substantially all that occurred at said interviews between me and defendants in reference to my business with Graham, or to said agreement or indenture. Neither of the defendants objected to that part of the lease wherein Graham pledged and mortgaged the crops raised on the Asia plantation in the year 1867 that I have any recollection of. Their objection seemed to be about honoring Graham's draft. I did not tell the defendants, or either of them, either in substance or to the effect, that such a mortgage or pledge by the laws of Mississippi was not authorized, and that, therefore, it was of no avail, or as if not written. I made no such statements. Such was not
86 my opinion of the mortgage clause in the lease, or of the laws of Mississippi, in relation to such a pledge as that contained in the lease. Leasing plantations being then comparatively a new business with us in Mississippi, I shewed this lease to two of the best lawyers in Mississippi, with whom I happened to meet, and took their opinion upon it before I saw defendants, and they both told me they thought it good in all its provisions, and that was my opinion when I talked with defendants. Graham certainly needed a considerable amount of supplies to cultivate the Asia plantation. I did not know his resources. He told me that defendants had agreed to provide him upwards of twenty thousand dollars—(I think he said twenty-seven thousand dollars)—in aid of his planting operations for 1867, and that he had leased two other places besides mine. I knew nothing about it of my own knowledge. I did not go with Graham to defendants to shew
87 them said lease, nor to aid him in inducing them to do anything about his business. Such a proceeding would have been presumptuous, on my part, for I had never seen either of the defendants until that business trip. When I went to New Orleans Graham sent by me to defendants his copy of the lease, and asked me to leave it with them, which I did, as before stated, two or three days before he reached the city.

To cross-interrogatory 2d he answers and says: I was on the Asia plantation during the greater portion of the month of January, 1867, for the purpose of closing up the business of the place for the year 1866, and leasing it to Graham for 1867, and of disposing of my effects upon it. I left the place in the latter part of January, 1867, and did not return there until in November, 1867, when I called there one day, at Judge Ellett's request, to collect for him the $3,500 note of Graham, as stated in my answer to complainant's fourth interrogatory. I got
88 there in the forenoon, took dinner with Graham and Ruhle, and left shortly afterwards. I suppose I was on the place two or three hours, and I was not there again until January, A. D. 1869. I know the truth of what I have stated personally and of my own knowledge, except where my statements show otherwise, and then they show their own qualification, and the authority upon which they are made.

There was no water of the Mississippi River on the Asia plantation

during the time I was there, in the months of January and November, 1867, for the river was within its banks, and low during both those months. I know nothing, of my own knowledge, whether the Asia place was or was not overflowed by the waters of the Mississippi River at any other time during the year A. D. 1867.

To cross interrogatory 3rd he answers and says: I know of nothing further that can aid the defendants herein.

(Signed) W'M SILLERS.

89 Sworn and subscribed before me this eighth (8th) day of February, A. D. 1870.

L. N. BALDWIN, *Com'r.*

And the said Sidney S. Neely, by me examined, in answer to said interrogatories and cross interrogatories, in answer thereto deposes as follows, to wit:

Deposition of Sidney S. Neely.

My name is Sidney S. Neely, and I reside in the county of Claiborne, and State of Mississippi; I know Henry T. Ellett, the complainant in this suit, but do not know either of the defendants, Butt, Flash, and Lyon.

To the 4th interrogatory: I know C. E. Ruble; I know that he was on the Asia plantation in Bolivar County, State of Mississippi, leased by John H. Graham from William Sillers, in the year 1867. He went there about the month of October, 1867, and remained there until the cotton-crop was all gathered and shipped. He was there as the agent of the defendants Butt, Flash, and Lyon, and acted as such agent while
90 he was there, for the purpose of settling their business with said Graham. He received the cotton-crop from said Graham, made by said Graham on said Asia place in 1867, and shipped it to Butt, Flash & Lyon, in New Orleans. I never knew or heard of his acting for any other person, or transacting any other business while he was in Bolivar County, Mississippi, except for the defendants, Butt, Flash & Lyon, and he always when in my presence represented himself to be their agent, and that his sole business was to settle with Graham.

To interrogatory 7th: In the fall of 1867, I saw in the hands C. E. Ruble a mortgage that said Graham had given on his stock and farming-utensils, to the defendants, purporting to secure them in money that said Graham owed them. I know that C. E. Ruble received of said Graham as agent of defendants, and on account of said mortgage debt, and gave Graham his receipt for it, as such agent, property that
91 answered the description of that in the mortgage and said it was the same. I was overseeing for Graham all the year 1867, on the "Egypt place," about two miles from the "Asia place," and as such overseer, and by Graham's directions, I delivered stock and farming utensils, which Graham said were embraced in said mortgage, to C. E. Ruble as agent of defendants, and it was embraced in the aforesaid receipt which C. E. Ruble gave as agent as aforesaid to Graham. I saw the receipt and read it. I ginned a portion of the crop made on the Egypt place in 1867, on the gin on the Asia place, and delivered it to C. E. Ruble as the agent of the defendants, and he shipped it to them. Graham lived on the Asia place in 1867. The road from the Asia place to the Mississippi River passes through the Egypt place, and near the dwelling-house. In the fall of 1867, Graham gave me a draft on defendants for two hundred dollars.

I sent it to New Orleans, and it was returned to me unpaid. I
92 spoke to C. E. Ruhle about it, and he told me that I did wrong to send it down without first speaking to him about it; that defendants would not pay any of Graham's drafts unless instructed by him, C. E. Ruhle, so to do. A short time afterwards C. E. Ruhle told me to send the draft down and defendants would pay it. Accordingly I sent the draft down, and it was paid. I know that C. E. Ruhle wrote letters addressed to the defendants in the fall of 1867, and during the same time received letters, which he said were from them.

To cross-interrogatory 2d: I was on the Asia plantation frequently during the year 1867, and especially during the latter part of said year, sometimes on business for Mr. Graham, and sometime as a visitor. My stays there were for a day or portion of a day at a time, except when I was ginning the cotton for John H. Graham, made on the Egypt place. I never spent a night there while doing business for Mr. Graham. I know the truth of what I have stated personally and of
93 my own knowledge, except where my statements show otherwise, and then they show the authority upon which they are made. The Asia plantation was partially overflowed in 1867, a part of it was not overflowed. The overflow of it commenced in March, 1867, and continued during that month, and then subsided, and I do not know of its being overflowed or injured by water after March, 1867.

To cross-interrogatory 3rd: I know nothing further in this case, or any other matter or thing that can aid the defendants herein.

(Signed) S. S. NEELEY.

Sworn and subscribed before me this 8th day of February, A. D. 1870.

L. N. BALDWIN, *Com'r.*

STATE OF MISSISSIPPI,
Claiborne County, ss:

I, L. N. Baldwin, commissioner named in the annexed commission, do certify that the foregoing depositions of William Sillers and Sidney S. Neely were taken before me at the time and place in the caption
94 thereof mentioned; that said witnesses were by me first carefully examined and cautioned and sworn to testify the whole truth; that the testimony of said witnesses was reduced to writing by me, and subscribed by the said witnesses; that I am not of counsel nor attorney for either party nor interested in the event of the cause.

Given under my hand and seal the 8th day of February, A. D. 1870.

(Signed) L. N. BALDWIN, [SEAL.]
Commissioner, &c.

At the execution of the annexed commission for the examination of witnesses between Henry T. Ellett, complainant, and Butt, Flash & Lyon, def'd'ts, this paper, Exhibit B, was produced and shown to the witnesses William Sillers, and by him deposed unto at the time of his examination as stated in his answer to complainant's sixth interrogatory before me the 8th of July, 1870.

(Signed) L. N. BALDWIN,
Commissioner, &c.

EXHIBIT B.

$3,500.] BOLIVAR COUNTY, MISS., *Jan'y 29th*, 1867.

On the first day of November next, I promise to pay W'm Sellers, or order, thirty-five hundred dollars, for rent of plantation.

(Signed) JOHN H. GRAHAM,
Man'g'r for Butt, Flash & Lyon, N. O.

(Written across the face:)

Secured by mortgage of this date.

(Signed) J. H. GRAHAM.

95 Endorsed: W'M SILLERS.

Commission for complainant issued December 17th, 1869, returned and filed May 19th, 1870.

Circuit court of the United States for the fifth judicial circuit, holding sessions in and for the district of Louisiana, to any judge or justice of the peace in Memphis, Tennessee:

Know ye that, reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call and cause to come before you John H. Graham, and him duly examine on the annexed interrogatories, on oath, touching and concerning certain matters and things in a case now pending in the said court, wherein Henry T. Ellett is plaintiff and Butt, Flash and Lyon are defend-
96 ants, and the same examinations, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause, and send also this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New Orleans this 17th day of December, anno Domini 1869, and the 94th year of the Independence of the United States of America.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clk.*

Interrogatories propounded to John H. Graham, under and annexed to commission.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681. U. S. circuit court.

Interrogatories to be propounded to John H. Graham, and other witnesses for complainant, residing in Memphis, Tennessee, to be examined under the annexed commission.

1st. What is your name and residence? Do you know the parties? Have you any knowledge of a certain agreement between W'm Sillers and yourself dated 1st January, 1867, whereby you leased the
97 "Asia" plantation in Bolivar County, Mississippi, for said year 1867, and whereby you granted a mortgage and pledge of the crops of that plantation? Have you any knowledge relating to the communication of said agreement, or the contents thereof, to Butt, Flash & Lyon, defendants herein? If yea, state how, when, and where, by

whom, to whom the same was communicated, the purpose for which, and the circumstances under which the same was communicated, and all you know relative thereto.

3rd. Do you know C. E. Ruhle? Have you any knowledge of his being in Bolivar County, Mississippi, or on the Asia plantation in the year 1867? If yea, state when he was so present and where he was so present. Have you any knowledge of C. E. Rulhe being the agent or representative of any person or persons at said time? If yea, state for whom he was agent or representative, and how you know the fact. Was he, said Rulhe, or was he not in the employ of any person or persons, or was he or was he not acting for or on behalf of any person or persons at said time? If yea, state in whose employ was he, and
98 for whom or on whose behalf he was acting; if you say said Rulhe was so acting, state what he did.

4th. Have you any knowledge of the shipment or removal of the crops, made on the Asia plantation aforesaid, in 1867? If yea, state when, where, to whom, and by whom they were so shipped, and when, where, and by whom they were so removed. Had or had not said C. E. Rulhe anything to do, or had he or had he not any connection with said shipment or removal of said crops? If yea, state what had he to do therewith and what connection he had therewith.

5th. What was the crop made, on said "Asia" plantation, in the year 1867? State the quantity and value thereof, what became of it. Did or did not any part of said crop belong to the freedmen; if yea, what part, and what became of said part?

Have you any knowledge of any *convenatum* or intercourse between defendants in reference to said agreement of lease of said plantation and the mortgage of the crops of said plantation, referred to in the 1st interrogatory? If yea, state where, when, and between whom said
99 intercourse or conversation took place; state fully and particularly all that was said and passed in said intercourse and conversation; and state what was said, and by each of the parties, to said intercourse and conversation, and all the circumstances connected therewith. Did you give William Sillers any note? If yea, state when, the am't thereof, and the consideration of said note. Who now holds the said note?

7th. State anything further you may know of service to complainant. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this case or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

(Signed) LEA, FINNEY & MILLER, *Att'ys.*

8th. If you speak of any conversation between defendants and William Sillers, in reference to said agreement of lease of such plantation and to the mortgage and pledge of the crops of said Asia plantation therein contained, state whether anything was said in said co'-
100 versation or conversations touching the waiver or relinquishment, by said Sillers, of said mortgage and pledge; state all that was said on that subject and by whom it was said. Was or was not any propositions made for the waiver of such mortgage and pledge? If yea, state by whom made, what was the response, if any; state all that was said touching said mortgage and pledge.

Affidavit and order for and proof of capacity of judge or justice ex-

ecuting the commissions is waived; it is agreed it may be executed by any judge or justice of the peace.

Nov'r 24th, 1869.

(Signed) CLARKE, BAYNE & RENSHAW,
For Def'd'ts.

Cross-interrogatories annexed to commission.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681. U. S. circuit court.

The defendants, reserving all legal exceptions to the interrogatories propounded to John H. Graham & als., propound the following cross-interrogatories:

101 1st. If you speak of having communicated to defendants, or either of them, the lease of the Asia plantation, state who were present at the time, and what language was used in that communication. Did not defendants, or one of them, call your or Sillers' attention to the claim in reference to the mortgage or pledge of crops, and object thereto, and did you not, or Sillers, reply in words like this or of similar import, "that is of no consequence, as the laws of Mississippi do not authorize such a mortgage or pledge?" If this is not the language used, state what was said by you and by Sillers, and to what language, and from whom was it a reply.

2d. If you speak of Rulhe, and of his presence on the Asia plantation, and if his connection with the shipment of crops to defendant, state whether you did not authorize or make said shipment. Did you not make the same yourself? Did you not authorize Rulhe to make the same?

3rd. Have you not been declared a bankrupt? If yea, when and by what court?

102 4. Do you know any matter or thing that can aid the defendants in this suit?

(Signed) CLARK, BAYNE & RENSHAW,
For Def'd'ts.

Answer of John H. Graham to interrogatories and annexed to commission

UNITED STATES OF AMERICA,
District of Louisiana:

In the circuit court for said district, in chancery.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. }

Be it known that on this fourteenth day of January, A. D. 1870, I, the undersigned, a justice of the peace in and for the county of Shelby, State of Tennessee, did cause to come before me, at my office in the city of Memphis, in said county and State, John H. Graham, the witness named in the commission to which this is attached, and having first duly sworn the said witness to testify the truth, the whole truth, and nothing but the truth, did proceed to examine him upon the

interrogatories and cross-interrogatories annexed to the said com-
103 mission, when the said witness answered and testified as follows:

1st. To the first interrogatory he answers and says: My name is John H. Graham. My residence is in Shelby County, Tennessee, about four miles from Memphis. I know the parties, complainant and defendant, in this cause.

2d. To the second interrogatory he answers and says: I have knowledge of the agreement mentioned in this interrogatory. I rented the Asia plantation, in Bolivar County, Mississippi, from said W'm Sillers, for the year, 1867, and the said instrument is the lease entered into between said Sillers and myself, and contains a mortgage or pledge of the crops as security for the rent. I gave said Sillers my note for $3,500 for one-half the rent, and my draft on the defendants Butt, Flash & Lyon for the same amount for the other half, and when said Sillers went to New Orleans, in the early part of February, 1867, to get the draft accepted, I gave him my duplicate of said lease, and requested him to deliver it to Butt, Flash & Lyon. They delayed accepting
104 my draft, and telegraphed me to come to New Orleans. I went and had several interviews with them, some of them in the presence of said Sillers. I saw the said lease in the possession of said defendants at the time, and left it with them, and they have had it in their possession ever since. It was communicated to them to show the terms of my agreement with said Sillers, and they accepted my draft for $3,500 for one-half the rent, with full knowledge of the contents and conditions of said lease.

To the third interrogatory he answers and says: I do know C. E. Rulhe. He came to the Asia plantation aforesaid in the fall of 1867, about the beginning of cotton-shipping, and staid at my house on said place until the crop was gathered and shipped. He came there as the agent and representative of the defendants Butt, Flash & Lyon, to attend to sending forward to them the crop made on said place, and on another plantation adjoining, also cultivated by me. He told me he came as their authorized agent and representative, and he acted as such during his stay; he brought me a letter from the defendants
105 introducing him to me as their agent, and he wrote letters to them and received letters from them while there, in relative to the business. I annex two pages of the letter of introduction alluded to, marked A; the last page, containing the signature, I am unable to lay my hands on at this time. I also annex another letter, marked B, of the defendants, dated December 10th, 1867, received by me while Rulhe was with me. He also showed me a power of attorney from Butt, Flash & & Lyon, which I believe he put on record in Bolivar County. The said Rulhe acted as the agents of said defendants, and attended to their interest. He received cotton for them, and shipped it, and corresponded with them during his stay.

To the fourth interrogatory he answers and says: The crop of cotton made on the said Asia plantation in the year 1867, only amounted to about sixty-three bales, being almost a total failure. The whole crop was delivered to and received by the said Rulhe, as agent of the de-
106 fendants, Butt, Flash & Lyon, as fast as it was prepared for market. The cotton was delivered to him by Mr. Richard, the overseer, by my orders, and Mr. Rulhe shipped it to the defendants, and took the bills of lading in his own name.

To the fifth interrogatory he answers and says: The crop made on the Asia plantation in 1867 only amounted to about sixty-three bales. The bales would average about 425 pounds, and at the time such cotton was worth about 21 to 23 cents a pound. Some of it was sold for 23

cents. One fourth of the crop belonged to the negroes that worked on the place, and their share was also delivered to Rulhe, and shipped to Butt, Flash & Lyon.

To the sixth interrogatory he answers and says: I gave my note to said Sillers for $3,500.00, dated January 29th, 1867, and due Nov'r 1st, 1867, being one half the stipulated rent. Said note is now held by the complainant, H. T. Ellett, and is the foundation of this suit. I was present at several conversations to which W. Sillers, myself, and one
107 or more of the defendants were parties, but do not remember any particular interview between the defendants themselves, and therefore cannot state the substance of it.

To the eighth interrogatory he answers and says: I heard nothing said in any conversation between said Sillers and any of the defendants on the subject of any waiver or relinquishment of the mortgage or pledge of the crops. It seemed to be the understanding of all parties that Sillers would have a lien on the crop for the rent.

To the first cross-interrogatory he answers and says: I sent the lease and mortgage to the defendants by said Sillers, and was not present when it was delivered, and therefore cannot state what passed. I saw the document afterwards in the hands of the defendants. I recollect no such conversation as that supposed in this cross-interrogatory.

To the second cross-interrogatory he answers and says: I delivered the whole crop to Rulhe, as the authorized agent of the defend-
108 ants, expecting him to ship it to them, which he did.

To the third cross-interrogatory he answers and says: I have applied for a discharge in bankruptcy to the district court of the northern district of Mississippi.

To the fourth cross-interrogatory he answers in the negative.

(Signed) JOHN H. GRAHAM.

LETTER A.—*Annexed to the foregoing interrogatories.*

NEW ORLEANS, *Sept'r 27th*, 1867.

MR. JOHN H. GRAHAM, *Bolivar County, Miss.:*

This will introduce to you Mr. Chas. E. Rulhe, whom we send to fix up your books for you, and to ascertain the exact condition of affairs, so we may be able to know exactly what to do and what to expect. He will also aid you in attending to shipment of your cotton, &c.

Your favor of the 22d inst. is just to hand, and we confess pre-
109 sents a very gloomy account indeed of your affairs. That the worms should have done so great an amount of damage in so short a time seems almost incredible. One thing you must remember, that is, we have dealt with you very liberally. Indeed, on examination of your account, we have done more than any one could have expected. We have paid a great deal of money out for you, and we rely on your using every endeavor to pay us all you can. We send a memorandum of your account, with the name of every one in whose favour drafts were drawn, and want you to examine the items carefully, and report what each was for.

We send "duplicates" of each of your bills, and will thank you to show Mr. Rulh how much you have charged up to the hands. You must have supplied them with, say, at least $4,000 or $5,000 worth of goods. That must come out of their share of your crop.

We think you ought to go to work at once and see what you can do towards compromising with Sellers & Parkinson. We do not see

110 what you mean by being garnisheed for the rent of the Polk place.

Give Mr. Ruhl all the aid and assistance you can, so he can write us a full statement of every thing. Give him a full and complete list of all the stock of every sort, all the farming implements and utensils. Give him a memorandum of your contract with your laborers. Let him know what the debt of

Letter marked "B," and annexed to foregoing interrogatories.

NEW ORLEANS, *December 10th*, 1867.

Mr. JOHN H. GRAHAM, *Bolivar:*

DEAR SIR: Your favor of the 1st is at hand and duly noted. Mr. Lyon is now absent up Red River, when he may see Mr. Polk on the sugar business; he has had that matter in hand, and we do not know what to say to you on the subject till he returns; that project promises best for us all.

111 If we do nothing with him, it may be best to run the Polk place in Bolivar on a small scale, as the rent will have been paid.

Can't you get Mr. P. to reduce the rent, inasmuch as the levees were not repaired, and the place unproductive to us?

The writer is as most severely disappointed at your want of success, after your many representations, and your business has been the most damaging he ever encountered. You had better come down here and see us, when we can confer fully as to what to do for the best, so as to give you an opportunity to make up in some measure the heavy amount we are out of pocket, and we wish you would give Mr. Ruhl all the assistance you can in saving all we can from the wreck.

Yours, respectfully,

(Signed) BUTT, FLASH & LYON.

Mr. Lyon will be here next week, about the first of it. Can't you come down some time soon?

I, Hume F. Hill, a justice of the peace in and for the county of Shelby, State of Tennessee, do certify that the foregoing deposition of

112 John H. Graham was taken before me, at my office in the city of Memphis, on the 14th day of January, A. D. 1870, by virtue of the commission, and upon the interrogatories and cross-interrogatories hereunto attached; that the said witness was carefully examined and cautioned and sworn to testify the whole truth as stated in the caption hereof, & that the testimony of the said witness was reduced to writing in my presence by him, and signed by the said witness, and that I am not of counsel or solicitor for either of said parties to the said suit, nor am I interested in the event thereof.

[SEAL.] (Signed) HUME F. HILL, *J. P.*

Commission for complainant issued Dec. 17th, '69, returned and filed February 28th, 1870.

Circuit court of the United States for the fifth judicial circuit, holding sessions in and for the district of Louisiana, to Charles Scott or George T. Lightfoot, or any judge or justice in Bolivar County, Mississippi:

113 Know ye that, reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that

you call and cause to come before you, and duly examine on the annexed interrogatories, on oath, touching and concerning certain matters and things in a case now depending in the said court, wherein Henry T. Ellett is plaintiff and Butt, Flash & Lyon are defendants, and the same examinations so taken and reduced to writing you certify under your hand and seal and send enclosed to this court without delay, to be read in evidence on the trial of said cause; and send also this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New Orleans this 17th day of December, anno Domini 1869, and the 94th year of the Independence of the United States of America.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clerk*.

Interrogatories propounded to Charles Burrus, John C. Burrus,
114 *William B. Eckles, William S. Cook, Robert N. Neblett, and other witnesses under and annexed to commission.*

H. T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681. U. S. circuit court.

Interrogatories to be propounded to Charles Burrus, John C. Burrus, William B. Eckles, William S. Cook, Robert N. Neblett, and others, witnesses for complainant, residing in Bolivar County, Mississippi, to be examined under annexed commission.

1st. What is your name and residence? Do you know C. E. Rulhe; when, when, and how long have you known him? Do you know the Asia plantation in Bolivar County, Mississippi?

2d. Was said C. E. Rulhe in Bolivar County, Mississippi, in the year 1867; if yea, when? Was he or was he not then agent or representative of any person or persons? If yea, state for whom he was agent or representative, and how you derive your knowledge, if any you have. Was he or was he not engaged in attending to any business in
115 Bolivar County, Mississippi, at that time? * If yea, state fully & particularly what business he was attending or devoting himself to at that time. * If you say he was attending to any business, state whether he was acting for or on behalf of any person or persons; if yea, state the names of such person or persons. State fully all you know in the premises.

3rd. Was or was not said C. E. Rulhe on said Asia plantation in 1867? If yea, state when, and what he was doing there.

4th. Had or had not said Rulhe any connection with or did he or did he not exercise any direction or control over any crops of cotton made in said Bolivar County in 1867? If yea, state what crops, where, and by whom grown or raised, and what was his connection, if any, therewith, or what control or direction over them, if any, he exercised, and how; when, and in what manner he exercised said control or direction. Have you any knowledge of said C. E. Rulhe shipping or causing to be shipped, or removing or causing to be removed, any cotton raised and grown in Bolivar County, Mississippi, during 1867? If yea, state the quantity of cotton he so shipped, or cause to be shipped, removed
116 or caused to be removed, when and by whom it was grown and raised, by whom and to whom it was shipped, when it was shipped, and all you know connected therewith.

5th. What crops was made in 1867 on the Asia plantation, cultivated by John H. Graham in that year? Was said crops shipped to any one; If yea, to whom? Who shipped it? Who controlled or directed its shipment? Had or had not said Rulhe any connection with said crop or the shipping of said crops? If yea, state what was said connection, fully and particularly.

6th. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this case, or either of them, or that may be material to this the subject of this your examination, or the matter in question in this cause? If yea, set forth the same fully and at large in your answer.

(Signed) LEA, FINNEY & MILLER, *Att'ys.*

The defendants, reserving all legal exceptions, prepared the following cross-interrogatory:

117 1st. What is the sum of your knowledge of what you state? If you speak of Rulhe as acting as agent for any one, state how you know the fact stated. Is your knowledge derived from the statement to you of any one? State who. If you say that it is derived from a knowledge of any writing, produce the same.

(Signed) CLARKE, BAYNE & RENSHAW,
For Def'ts.

Affidavit and order for commission waived, and it is agreed it may be executed by Charles Scott or George T. Lightfoot, or any judge or justice, proof of whose capacity as such is waived.

Nov. 24th, 1869.

(Signed) CLARKE, BAYNE & RENSHAW,
For Def'ts.

In the circuit court of the United States for the fifth judicial district, holding sessions in and for the district of Louisiana.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON.

The deposition of John C. Burrus, sen'r, William S. Cooke, Charles A. Burrus, and William B. Eckles, taken by me in Bolivar County, Mississippi, on the 17th day of February, A. D. 1870, in behalf
118 of the complainant, in pursuance of this annexed commission to me directed, and upon the interrogatories and cross-interrogatories thereto attached, to be read in evidence in a suit depending in the circuit court of the United States for the fifth judicial district, holding sessions in and for the district of Louisiana, in which Henry T. Ellett is complainant, and Butt, Flash & Lyon are defendants. The said John C. Burrus, sen'r, William S. Cooke, Charles C. Burrus, and William B. Eckles, being respectfully of the age of 25 and upwards, and first by me carefully examined and cautioned and sworn to testify the whole truth in answer to said interrogatories and cross-interrogatories, depose and say as follows, to wit:

1st. The witness JOHN C. BURRUS, in answer to the first interrogatory, answers as follows, to wit: My name is John C. Burrus, s'r, and my residence is Bolivar County, Miss. I know C. E. Rule. I was introduced to him in Bolivar County about the latter part of 1867. He re-

mained in the county some two or three months; left here, and I have never seen him since. I know the Asia plantation referred to.

119 2d. In answer to second interrogatory witness says: As I have stated, C. E. Rule was in Bolivar County in the latter part of the year 1867. He was an agent and representative of the defendants Butt, Flash & Lyon, as evinced by a power of attorney from them to him, which he showed to me, and which I read. He showed me this to get me to write a power of attorney from him to William S. Cook, making Cook subagent under him for Butt, Flash & Lyon. Rule represented that Graham had run off some of the property from the Asia place, and he was unable to follow it, and this power of attorney was to Cook to enable him to follow and recover it. The power of attorney from Butt, Flash & Lyon to Rulhe convey' ample powers to him to protect and guard their interest here with reference to Jno. H. Graham. Rulhe's business here, as far as I know, seemed to be exclusively as agent of Butt, Flash & Lyon, and I never heard of his transacting any other business.

3rd. In answer to 3rd interrogatory witness says: I never saw

120 Rulhe on the Asia place, because I was not there on the place in the latter part of 1867, but I saw him passing back and forth from the direction of the Asia place to the river, and it was matter of general*ly* reputation in the neighborhood that he was staying on the Asia and Egypt places watching the interests of Butt, Flash & Lyon with John H. Graham.

4th. In answer to 4th interrogatory witness says: I know nothing of the details of Rulhe's actions under his power of attorney from Butt, Flash & Lyon. I know nothing of any connection he had with any cotton raised in Bolivar County, of his receiving or shipping any or causing it to be done.

5th. In answer to fifth interrogatory witness says: I know nothing about the amount of crop made on Asia plantation in 1867. I saw wagons from the Asia place occasionally in fall of 1867, carrying cotton to the river, but I knew nothing about its shipment or to whom

121 it was shipped. My son, Charles A. Burrus, was doing a receiving and forwarding business at the river, and he probably shipped it, but I don't know. I don't know whether Rulhe exercised any connection with said crop or its shipment.

6th. In answer to 6th interrogatory witness says: To the best of my recollection the power of attorney from Butt, Flash & Lyon to Ruhle had been recorded in Bolivar County, Miss., at the time it was shown to me, and had no certificate of record on it in Bolivar County. I do not know that I can state any other matter at all in reference to this subject.

In answer to 1st cross-interrogatory witness says: I know the truth of what I have stated personally and of my own knowledge, except where my statements show otherwise, and there they show the authority upon which they are made. The power of attorney from Butt, Flash and Lyon to Ruhle was retained by him, and is not in my possession and cannot be produced by me.

(Signed) JOHN C. BURRUS, Sr.

122 The witness WILLIAM S. COOK, in answer to the 1st interrogatory, answers as follows, to wit: My name is William S. Cook. My residence is Bolivar County, Miss. I knew a Mr. Ruhle who was here in Bolivar County in the winter of 1867 or '8. He remained here seve-

ral weeks, and left, and I have not seen him since. I know the Asia plantation in Bolivar County, Miss.

In answer to interrogatory 2ond witness says: Mr. Ruhle was here in the latter part of 1867 and in the begin'ing of 1868, as the agent of Butt, Flash & Lyon, which information I derived by the exhibition of a power of attorney from Butt, Flash & Lyon to him, authorizing him to act for them in settling their business with John H. Graham. To the best of my reccollection the power of attorney was all properly executed and authenticated, and to every appearance genuine. I thought it was genuine, because I examined it with a view of acting under him, but the business being an unpleasant one I declined to act. Mr. Ruhle was here attending to the business of Butt, Flash & Lyon with
123 John H. Graham, in the winter of 1867 or '8, and with no other person that I ever heard of, nor was he doing any other business that I ever heard of. Ruhle stated that Graham had run off his stock and requested me to assist him in finding and seizing it, and wanted to give me a power of attorney for that purpose to aid him. He told me, also, that out of $35,000 advanced to John H. Graham by Butt, Flash & Lyon, he did not think they would get back more than $5,000. The power of attorney from Butt, Flash & Lyon to Ruhle gave him full and ample power to settle all their business with John H. Graham.

In answer to 3rd interrogatory witness says: I suppose he was on the Asia place attending to the business of Butt, Flash & Lyon, in 1867, but I never saw him there and can't state of my own knowledge.

In answer to 4th interrogatory witness says: Mr. Ruhle told me he was here for the purpose of receiving from Graham the cotton raised by him in this county in 1867, and shipping it to Butt, Flash &
124 Lyon. He told me the number of bales he had shipped, and how many more he would ship, but I don't remember the number. Graham's crop, so far as I know, was the only one that Ruhle had anything to do with. I am unable to give any further answer to this interrogatory.

In answer to 5th interrogatory witness says: I am not able to give any answer to this interrogatory other than I have given in the answer to 4th interrogatory.

In answer to 6th interrogatory witness says: I know of nothing further than I have already stated.

In answer to 1st cross-interrogatory witness says: I know the truth of what I have stated personally and of my own knowledge, except where statements show otherwise, and there they show upon what authority they are made. The power of attorney from Butt, Flash & Lyon, showed me by Ruhle, was retained by him, and I have it not in my possession and can't produce it.

(Signed) WM S. COOK.

125 The witness CHARLES A. BURRUS, in answer to 1st interrogatory, answers as follows, to wit: My name is Charles A. Burrus; residence in Bolivar County, Miss.: I knew C. E. Ruhle in this county in the winter of 1867 and 1868; he came here in October, 1867, and remained until January, 1868, then left the county and I have since seen him in New Orleans; I know the Asia plantation in Bolivar County, Miss.

In answer to 2d interrogatory witness says: Ruhe was here in the latter part of 1867, and acted as agent for the house of Butt, Flash & Lyon. He showed me a power of attorney from that house to himself, and I read it; it was signed by the firm, and I know the signature to be genuine, be-

cause I had received letters from the house of Butt, Flash & Lyon, and had seen the letters from the same house to Graham, which I have read, and I know their handwriting; Graham very frequently handed me their letters to him to read, and I read them. I used the power of attorney from Butt, Flash & Lyon to Ruhle on one occasion as a form from
126 which to write a power of attorney for other parties and had it before me while writing. Ruhl was engaged, while in the county, in attending to no business that I know of, except the business of Butt, Flash & Lyon with Graham; he devoted himself to that business exclusively; he got all the cotton that he could that was raised by Graham in the year 1867, for the house of Butt, Flash and Lyon, and shipped it to New Orleans to them; all the cotton that was shipped by Ruhl to Butt, Flash & Lyon, had to pass through my hands as deputy collector of taxes for the Levee Board, and as clerk for the deputy U. States collector of taxes; and a great deal of it as shipping and receiving merchant, which business I was carrying on at Melrose landing in this county; the power of attorney from Butt, Flash & Lyon to Ruhle gave him full and ample power to settle any and all business of theirs with Graham, and was the fullest I ever saw. Mr. Ruhle on one occasion asked me to lend him money, which I at first declined to do, but upon his showing me the power of attorney from Butt,
127 Flash & Lyon to him, it was so full and satisfactory, that I loaned him the money, and took his draft on that house for the same, which they duly honored; all this was in the winter of 1867. At one time in that winter Graham's wagons brought 18 bales of cotton out to my landing that were raised on the Egypt and Asia plantations and delivered it to me for shipment, and Ruhle ordered it to be shipped to the house of Butt, Flash & Lyon; on the same day Graham ordered 2 bales of this cotton to Memphis for his account. Just as I was taking out a bill of lading for the other 16 bales which I was shipping to the house of Butt, Flash & Lyon, Ruhle came up, and I told him that Graham had ordered two bales to be sent to Memphis, and that only 16 were on the boat going to New Orleans; he said no, the whole must go to Butt, Flash and Lyon, and so I sent it; Graham came up a short time after, and on my telling him of it he made no objection.

In answer to 3rd interrogatory witness says: Ruhle was on
128 the Asia plantation in the latter part of 1867, attending to the business of Butt, Flash & Lyon with Graham, he was receiving cotton from him for that house and shipping it to them at New Orleans, and was getting anything else he could from Graham for their account.

In answer to 4th interrogatory witness says: In the latter part of 1867, Ruhle was here and received the crops of cotton raised by John H. Graham in 1867 in this county, for Butt, Flash & Lyon, and shipped it to them; he was engaged in no other business of any sort that I know of except that of Butt, Flash & Lyon with Graham, as already stated. I know nothing of his shipping any other cotton except that of Graham to Butt, Flash and Lyon. I don't remember how much of said cotton Ruhle shipped, and now have no books or memoranda with which to refresh my memory; the only record that I kept stating the amount of cotton shipped by me was one for the deputy collector of the United States tax, which I have long since turned over to him, and don't know
129 where it now is.

In answer to 5th interrogatory witness says: I don't know exactly how much cotton was raised by Graham on the Asia place in 1867, but think it was from 50 to 60 bales. It was shipped to Butt, Flash &

Lyon by C. E. Ruhle through me as his shipping and forwarding merchant.

In answer to 6th interrogatory witness says: At the time I saw the power of attorney from Butt, Flash & Lyon to Ruhle it had no certificate of record on it for Bolivar County. I know of nothing further with reference to the subject of my examination.

In answer to cross-interrogatories 1st witness says: I know the truth of what I have stated personally and of my own knowledge, except where my statements show otherwise, and there they show their own qualifications and the authority upon which they are made. Ruhl retained the power of attorney from Butt, Flash & Lyon, and have no means of producing . I quit the receiving and forwarding
130 business about 2 years ago, and all letters that had no reference to my unfinished business I destroyed, and therefore cannot produce the letters written to me by Butt, Flash & Lyon, they having been destroyed.

(Signed) CHARLES A. BURRUS.

The witness WILLIAM B. ECKLES, in answer to interrogatory 1st, answers as follows, to wit: My name is William B. Eckles. My residence is Bolivar County, Mississippi. I knew Mr. C. E. Ruhle in the latter part of 1867 in this county, Bolivar. He remained here two or three months, and left in January, 1868. I hav'n't seen him since. I knew the Asia plantation in Bolivar County, Miss.

In answer to interrogatory 2d witness says: C. E. Ruhle was in Bolivar County in the latter part of 1867. I heard him say he was agent for Butt, Flash & Lyon, and he showed me a power of attorney from Butt, Flash & Lyon to himself, which I read. He was acting as agent and representative for Butt, Flash & Lyon, and settling their business with John H. Graham in this county. He got stock from Graham
131 for Butt, Flash and Lyon, which he delivered to me to keep for him. Ruhl was showing his power of attorney from that house to him to the neighbors, asking their opinion whether it gave him full and ample powers as agent to take stock from Graham for Butt, Flash & Lyon's debt. I read the power of attorney and thought the powers conveyed by it were full and ample to authorize him to transact any business with Graham that they themselves might do. I know of Ruhle's shipping two bales of cotton to the house of Butt, Flash & Lyon which he received from Graham in January, 1868. I know of Ruhle's attending to no other business while in Bolivar County except that of Butt, Flash & Lyon with Graham, and never heard of his having any other. He appeared to be devoting himself to that exclusively.

In answer to 3rd interrogatory witness says: I never saw Ruhl on the Asia plantation in the latter part of 1867, but I heard him say several times that he was on that plantation attending to Butt, Flash and Lyon's business with Graham in the latter part of 1867.

132 In answer to 4th interrogatory witness says: I know nothing of Ruhle's having any connection with any crop of cotton in 1867, or shipping or control'ing any except the 2 bales mentioned. I don't know when or by whom those 2 bales were raised. They were shipped from Nebletts' landing, in Bolivar County, by Ruhl, to Butt, Flash and Lyon.

In answer to 5th interrogatory witness says: I know nothing about *of* cotton raised on Asia place in 1867, and am unable to answer any portion of this interrogatory.

In answer to 6th interrogatory witness says: I have stated all that I know reference to the subject of my examination.

In answer to cross-interrogatory witness says: I know the truth of all that I have stated personally and of my own knowledge, except where my statements show otherwise, and there they show the authority upon which they are made. I can't produce the power of attorney from Butt, Flash & Lyon to Ruhl, because it is not in my possession
133 and I do not know where it is. Ruhle retained it himself. I hereto attach as part of my answer to this cross-interrogatory an instrument of writing drawn up and signed by C. E. Ruhle as duly authorized agent of Butt, Flash & Lyon, authorizing and commissioning me to keep stock, cattle, farming-implements, wagons, &c., for him, subject to the order of Butt, Flash & Lyon, which instrument of writing is marked Exhibit Echols. I am unable to produce any other writing having reference to the matter in question.

(Signed) W. B. ECKLES.

EXHIBIT ECKOLS.

This reference approved.
F. A. WOOLFLEY, *Clerk.*

*Neblett's plantation, January 16th, 1868. Mr. William Eckles is hereby appointed the lawful keeper of all stock, cattle, farming implements, waggons, &c., left by me here, in his charge, belonging to Mess. Butt, Flash & Lyon, & subject to their orders.

(Signed) C. E. RUHLE,
*Duly authorized agent for Butt, Flash & Lyon.**

At the execution of the annexed commission for the examination of witnesses between Henry T. Ellett, complainant, and Butt, Flash & Lyon, defendants, this paper was produced and shown to the witness William B. Eckles, and by him deposed unto at the time of his examination as stated in his answer to defendant's 1st cross-interrogatory before me this 17th day of February, 1870.

(Signed) CHA'S SCOTT, [SEAL.]
U. S. Commissioner.

STATE OF MISSISSIPPI,
Bolivar County:

134 I, Charles Scott, the commissioner named in the annexed commission, do certify that the foregoing depositions of John C. Burrus, s'r, William S. Cook, Charles A. Burrus, William B. Eckles, were taken before me at the time and place in the caption thereof mentioned; that said witnesses were by me first carefully examined, and cautioned and sworn to testify the whole truth; that the testimony of said witnesses was reduced to writing by me and subscribed by the said witnesses; that I am not of counsel nor attorney for either party, nor interested in the event of this cause.

Given under my hand and seal this 17th day of February, A. D. 1870.

(Signed) CHA'S SCOTT, [SEAL.]
Commissioner.

Motion and order: Case fixed.—From the minutes May 19th, 1870.

United States circuit court, fifth circuit and dist. of Louisiana, April term, 1870.

NEW ORLEANS, MONDAY, *May 9th,* 1870.

135 Court met pursuant to adjournment. Present, Hon. W. B. Woods, presiding judge; present, Hon. E. H. Durell, district judge.

H. T. ELLETT
vs.
BUTT, FLASH AND LYON. } 5681.

On motion of Lea, Finney and Miller, solicitors for complainants, ordered that the above case be assigned for trial on 19th instant at 11 a. m., and that def'd'ts be notified thereof.

Notice of trial and marshal's return.—May 9th, 1870.

Circuit court of the United States for the sixth judicial circuit & eastern district of Louisiana.

H. T. ELLETT
vs.
BUTT, FLASH & LYON. } 5681.

You are hereby notified that this case is assigned for trial for Thursday the 19th day of May, 1870, A. D., at 11 o'clock a. m.
By order of the court. Witness my hand and seal of the said court at New Orleans, this 9th day of May, A. D. 1870.
[SEAL.] (Signed) F. B. VINOT, *D'y Clk.*
To CLARKE, BAYNE & RENSHAW, Esq'r.

136 *Marshal's return.*

Received, May 17th, 1870, by the U. S. marshal, and on the same day, month, and year served Clarke, Bayne & Renshaw, named herein, with a copy of this notice of trial by handing the same to T. L. Bayne, a member of said firm, in person. N. O., May 17th, 1870.
(Signed) JOHN FAHY,
D'y Marshal.

Motion and order: Case fixed.—Extract from the minutes of February 20th, 1871.

ELLETT
vs.
BUTT, FLASH & LYON. } 5681.

On motion of Lea, Finney and Miller, solicitors for complainant, ordered that the cause be set for trial on 25th inst. at 11 a. m., and that defendants be notified hereof.

Notice of trial and marshal's return.—February 20th, 1871.

Circuit court of the United States for the fifth judicial circuit and district of Louisiana.

HENRY T. ELLETT
vs.
137 BUTT, FLASH & LYON. } No. 5681.

You are hereby notified that this case is assigned for trial for Saturday, the 25th day of February, A. D. 1871, at 11 o'clock a. m.
By order of the court.

Witness my hand and seal of said court, at New Orleans, this 20th day of February, A. D. 1871.

[SEAL.] (Signed) F. B. VINOT, *D'y Clk.*

To CLARKE, BAYNE & RENSHAW.

Marshal's return.

Received, February 21st, 1870, by the U. S. marshal, and on the same day, month, and year served a copy of this notice of trial on Clarke, Bayne and Renshaw, by leaving the same on desk of Mr. Renshaw, at office 48 Camp street.

(Signed) S. W. REED,
D'y U. S. Marshal.

FEB'Y 25TH, 1871.

Note of evidence.—Filed February 25th, 1871.

U. S. circuit court, district of Louisiana. No. 5681.

138 H'Y T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

Plaintiff offered deposition of W'm Sillers and al., and Exhibits A & B attached; depositions of Jno. C. Burrus and al., and John H. Graham, all taken under commission; also, documents A, B, & C, & admission.

All the testimony in the record is in evidence and offered by the parties respectively.

The above-mentioned depositions and exhibits are transcribed as follows:

Exhibit A, page 13.
do. B, do. 17.
do. C, do. 18.
Deposition of John H. Graham, page 102.
Deposition of John H. Burrus " 117.
Deposition of William Sillers " 74.

Admission.—Filed February 25th, 1871.

U. S. circuit court in chancery.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

139 It is admitted that the planting upon cotton-plantations in Mississippi does not commence before some time in March or April; never before March, and rarely until after.

(Signed) LEA, FINNEY & MILLER,
For Compl't.

Hearing and continuance of cause.—Extract from the minutes, November term, 1870.

NEW ORLEANS, *Saturday, February 25th*, 1871.

Court met pursuant to adjournment; present, Hon. W. B. Woods, pr's'd'g judge.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

This cause was called for trial—Lea, Finney & Miller, for complainant; Clarke, Bayne & Renshaw, for def'd'ts—when, after hearing the pleadings, evidence, and argument, the cause is continued till Monday, 27th inst., at 11 a. m., or first convenient day.

Motion and order, case fixed.—Extract from the minutes, November, term, 1870.

140 NEW ORLEANS, *Saturday, March 11th*, 1871.

Court met pursuant to adjournment; present, Hon. W. B. Woods presiding judge; E. H. Durell, district judge.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

On motion of Lea, Finney & Miller, of counsel for complainant, it is ordered that this cause be assigned for argument on the 17th March, 1871, at 11 a. m., and that defendants be notified thereof through their counsel.

Notice of trial and marshal's return.—March 11th, 1871.

Circuit court of the United States for the fifth judicial circuit and district of Louisiana.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

You are hereby notified that this case is assigned for trial for Friday, the 17th day of March, A. D. 1871, at 11 o'clock a. m.

141 By order of court.

Witness my hand and seal of the said court, at New Orleans, this 11th day of March, A. D. 1871.

F. B. VINOT, *D'y Clerk.*

To CLARKE, BAYNE & RENSHAW.

Marshal's return.

Received March 11th, 1871, by the U. S. marshal, and on the 15th day of same month and year served a copy of within notice of trial on Clarke, Bayne and Renshaw, named herein, by handing a copy of the

same to T. A. Clarke, a member of said firm, at their office, No. 48 Camp street, in this city.

N. O., March 15th, 1871.

S. W. REED,
D'y U. S. Marshal.

Order, continuance.—Extract from the minutes, March 17th, 1871.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

142 By consent of counsel the case is continued to 22d instant, at 11 a. m.

Order, continuance.—Extract from the minutes, March 22d, 1871.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON.

By consent of counsel the above case is continued till Tuesday, the 28th inst., at 11 a. m.

Motion and order, case fixed.—Extract from the minutes, Ap'l 18th, 1871.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

On motion of Lea, Finney and Miller, of council for plaintiff, it is ordered that this case be fixed for trial on the 29th instant, at 11 a. m., and that defendants be notified hereof.

Notice of trial.

Circuit court of the United States for the fifth judicial circuit and district of Louisiana.
143

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

You are hereby notified that this case is assigned for trial for Saturday, the 29th day of April, A. D. 1871, at 11 o'clock a. m.

By order of court.

Witness my hand and seal of the said court, at New Orleans, this 19th day of April, A. D. 1871.

F. B. VINOT, *D'y Clk.*

To CLARKE, BAYNE & RENSHAW.

Marshal's return.

Received April 19th, 1871, by the U. S. marshal, and on the 21st day of same month and year served a copy of within notice of trial on Henry

Renshaw, a member of firm of Clarke, Bayne and Renshaw, personally, at office of said firm, 48 Camp street, in this city.

New Orleans, April 21st, 1871.

S. W. REED,
D'y U. S. Marshal.

144 *Motion and order, case fixed.—Extract from the minutes, May 11th, 1871.*

H. T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

On motion of Lea, Finney and Miller, solicitors for complainant, ordered that the cause be assigned for hearing on the 22d instant, at 11 a. m., and that defendants be notified thereof.

Notice of trial.

Circuit court of the United States for the sixth judicial circuit and eastern district of Louisiana.

H. T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

You are hereby notified that this case is assigned for trial for Monday, the 22d day of May, A. D. 1871, at 11 o'clock a. m.

By order of court.

Witness my hand and seal of said court, at New Orleans, this 11th day of May, A. D. 1871.

F. B. VINOT, *D'y Clk.*

To CLARKE, BAYNE & RENSHAW, Esq.

145 *Marshal's return.*

Received, May 12th, 1871, by the U. S. marshal, and, on the 17th day of May, served Clarke, Bayne and Renshaw, by handing a copy hereof to H. Renshaw, a member of said firm, at their office, 48 Camp street.

May 22d, 1871.

S. W. REED,
D'y Marshal.

Hearing and submission of case.—November term, 1871.

NEW ORLEANS, *Tuesday, April 2d*, 1871.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, presiding judge.

HENRY T. ELLETT
vs.
BUTT, FLASH & LYON. } No. 5681.

This cause came up for trial—Lea, Finney and Miller, for complainant; Clarke, Bayne and Renshaw, for defendants—when, after hearing argument, the court took time to advise.

146 *Final decree.*

Circuit court of the United States, fifth circuit and district of Louisiana November term, 1871.

NEW ORLEANS, *Thursday, April 4th*, 1872.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, presiding judge.

H. T. ELLETT *vs.* BUTT, FLASH & LYON. } No. 5681.

This cause came on to be heard upon bill, replication, and proofs, when, after due consideration thereof, and argument of counsel, it is ordered, adjudged, and decreed that the complainant, Henry T. Ellett, do have and recover from the defendants, Butt, Flash, and Lyon, and from each of the members thereof, to wit, Cary W. Butt, William Flash, and Thomas T. A. Lyon, in solido, the sum of twenty-one hundred and forty-six $\frac{31}{100}$ dollars, with 5 % interest upon said amount from 1st November, 1867, till paid, and costs of suit.

147 Decree rendered April 4th, 1872.
Decree signed April 8th, 1872.
(Signed) W. B. WOODS, *Judge.*

Petition for appeal.

United States circuit court, district of Louisiana, 5th circuit, in equity.

HENRY T. ELLETT *vs.* BUTT, FLASH & LYON. } No. 5681.

To the honorable the judges of the circuit court of the United States in and for the fifth circuit, district of Louisiana:

The petition of Butt, Flash and Lyon, a commercial partnership, and Cary W. Butt, William Flash, and Thomas T. A. Lyon, members of said firm, respectfully shews that they are aggrieved by a judgment of this honorable court, rendered against them, in solido, on the 4th day of April, 1872, and signed on the 9th of same month, in favor of Henry T. Ellett, in the above-entitled cause; that they are advised that
148 there is error therein, to their prejudice, and so believe. They therefore pray for an appeal to the honorable the Supreme Court of the United States, which shall be suspensive, returnable on the first Monday of December next. And they will ever pray.

(Signed) CLARKE, BAYNE & RENSHAW,
Solicitors for Def'd'ts and Appellants.

Order.

An appeal is allowed in this case, as prayed for, returnable to the Supreme Court of the United States the first Monday of December next, the appellants giving bond in the sum of four thousand five hundred dollars, with good and solvent security, conditioned as the law directs.

April 16th, 1872.
(Signed W. B. WOODS, *Judge.*

Bond for appeal.—Filed April 16th, 1872.

Know all men by these presents that we, Butt, Flash and Ly-
149 on, a commercial firm, composed of Cary W. Butt, William Flash, and Thomas T. A. Lyon, as principals, and Charles H. Dolson and Henry L. Flash, of the city of New Orleans, as sureties, are held and firmly bound, jointly and severally, unto Henry T. Ellett, in the sum of four thousand five hundred dollars, lawful money of the United States of America, to be paid to the said Henry T. Ellett, his heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the sixteenth day of April, in the year of our Lord eighteen hundred and seventy-two.

Whereas the above-bounden Butt, Flash and Lyon have this day presented a petition to the honorable the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana,
praying an appeal from the final decree rendered against them in
150 a certain cause in equity, numbered 5681, of the docket of said court, wherein the said Henry T. Ellett is complainant and the said Butt, Flash and Lyon are defendants:

Now, the condition of the above obligation is, that we, the above-bounden Butt, Flash and Lyon, principals, and Charles H. Dolson and Henry L. Flash, sureties, will well and truly pay to the said Henry T. Ellett, the defendant in said appeal, all such damages as he may recover against us, in case it should be decided that the said appeal was wrongfully obtained.

(Signed)	BUTT, FLASH & LYON.	[L. S.]
(Do.)	CHA'S H. DOLSON.	[L. S.]
(Do.)	H. L. FLASH.	[L. S.]

Sealed, signed, and delivered in presence of—
(Signed) F. A. WOOLFLEY.

Cha's H. Dolson, surety on the within bond, being duly sworn, says that he resides in this city, and is worth the sum of forty-five hundred dollars over and above all his debts and liabilities.

(Signed) CHA'S H. DOLSON.

Sworn to and subscribed before me this 16th day of April, 1872.
(Signed) F. A. WOOLFLEY,
U. S. Comm'r.

151 Henry L. Flash, surety on the within bond, being duly sworn, says that he resides in this city, and is worth the sum of forty-five hundred dollars over and above all his debts and liabilities.

(Signed) H. L. FLASH.

Sworn to and subscribed before me this 16th day of April, 1872.
(Signed) F. A. WOOLFLEY,
U. S. Comm'r.

152 UNITED STATES OF AMERICA,
Circuit Court of the United States,
Fifth Circuit and District of Louisiana:

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for fifth circuit and district of Louisiana, do hereby certify that the fore-

going 151 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Henry T. Ellett vs. Butt, Flash & Lyon, No. 5681 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court at the city of New Orleans, this 25th day of July, A. D. 1872.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

[5c. int. rev. stamp, canceled.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law; and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 25th day of July, A. D. 1872.

E. H. DURELL, *Judge.*

[5c. int. rev. stamp, canceled.]

153 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to Henry T. Ellett, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the first Monday of December next, pursuant to a petition and an order for appeal, filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein the commercial firm of Butt, Flash and Lyon, composed of Cary W. Butt, William Flash, and Thomas T. A. Lyon, are defendants and appellants, and you are complainant & appellee, to show cause, if any there be, why the judgment rendered against the said Butt, Flash & Lyon, as in said petition mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this sixteenth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

W. B. WOODS, *Judge.*

154 On this 22d day of April, 1872, personally appeared before me the subscriber, S. W. Read, and makes oath that he served a copy of the within citation as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to and subscribed before me.

F. B. VINOT, *D'y Clk.*

Marshal's return.

Ap'l 16, '72.

On the 17th day of April, 1872, served a copy hereof on Henry T. Ellett, by handing it to H. C. Miller, one of the members of the law-firm of Lea, Finney & Miller, attorneys for said Ellett.

April 22, '72.

S. W. REED,
D'y U. S. Marshal.

(Indorsed:) United States circuit court. No. 5681. Henry J. Ellett vs. Butt, Flash & Lyon. Citation of appeal.

(Indorsement on cover:) No. 238. Cary W. Butt, William Flash, and Thomas T. A. Lyon, partners as Butt, Flash & Lyon, appellants, vs. Henry T. Ellett. Louisiana C. C. U. S. Filed 12th November, 1872.

In the United States Supreme Court.

BUTT, FLASH & LYON,
APPELLANTS,
vs.
HENRY T. ELLETT,
APPELLEE.

No. 238.

Brief for Appellants.

The bill, by a citizen of Tennessee against citizens of Louisiana, charges substantially:

That one, Sillers, a citizen of Mississippi, by agreement in writing, which was dated and executed on the 15th January, 1867, demised and let to Graham, a citizen of Tennessee, a plantation called Asia, in Bolivar county, Mississippi, the property of Sillers, for the term of one year from 1st January, 1867, at the rent of $7,000, to be paid one-half in Graham's draft on, and to be accepted by appellants, defendants in the court below, factors and commission merchants in New Orleans, payable 1st October; the remainder in Graham's note to the order of Sillers, payable 1st November, 1867.

That Graham, by the agreement, mortgaged and pledged to Sillers all the crops raised on the plantation in the year 1867, for the faithful performance of his covenants; and

authorized Sillers and his assigns, without legal process, to seize and sell the crops in case of failure of performance on the part of Graham.

That this lease and mortgage, duly executed, was duly acknowledged on the 4th February, and was recorded in Bolivar county on the 25th April, 1867.

That about the 8th February, 1867, Sillers and Graham met at New Orleans to close their agreement; that the contract between them was exhibited to appellants, and was read and understood by them, and a counterpart left with them; and that appellants, with full knowledge of its contents, accepted the draft for half the rent, which has been paid and extinguished.

That Graham took possession under the lease, and grew upon the plantation, in the year 1867, forty-nine bales of cotton, on which the lien and privilege of Sillers and of appellee attached under the mortgage.

That appellee had recovered judgment against Sillers in 1866 for $10,103, upon which execution issued, in virtue of which the sheriff of Bolivar county levied on all the right of Sillers in the plantation leased to Graham; and at the sale, 3d June, 1867, appellee became the purchaser, and the sheriff conveyed to him accordingly.

That the effect of this purchase was to substitute appellee to Sillers as the landlord of Graham, and to entitle him to receive all the rent accruing from Graham, all of which became due and payable after the sheriff's sale; and that Sillers, knowing and acquiescing in this effect, endorsed and delivered to appellee the note of Graham, of which appellee was then the legal holder.

That appellants in the fall of 1867 sent an agent to the plantation, who remained there from the commencement of the cotton picking until the crop was gathered and prepared for market, and who, by their authority and in-

structions, obtained from Graham from time to time the cotton raised on the plantation, as the same was ready for shipment, and shipped it to appellants at New Orleans, who received and disposed of it, and applied the proceeds to their own use, they well knowing that it was bound by and subject to the lien and incumbrance of the mortgage for security of the rent of the plantation.

That the cotton was so removed and shipped to New Orleans with intent to defraud appellee and defeat his mortgage lien, with full knowledge of his equitable title, and that appellants became and were in equity trustees of the cotton for the use of appellee, and are liable to account to him for the value.

That appellee, on being advised of the shipment of the first twenty-seven bales of the cotton, on the 25th November, 1867, sent a letter to appellants, by mail, notifying them of his claim and of his intention to hold them accountable to him for the value of the cotton, to which communication he received no answer; and that he has learned since the date of that letter that the whole of the forty-nine bales had then been shipped to appellants.

The prayer is for the value of the cotton to be applied to the principal and interest due on the rent note.

The appellants, in their answer, admit that Sillers and Graham were at their office about the 8th February, 1867, when the agreement, the lease, was exhibited to and read by them, and a counterpart left with them.

Appellants state that they were then about to aid Graham in the furnishing of supplies to enable him to cultivate several large plantations, and they called the attention of Sillers to that portion of the agreement whereby Graham mortgages and pledges all the crops raised on the Asia plantation in the year 1867, and objected to the same; whereupon Sillers stated, in substance, that the laws of

Mississippi did not authorize a mortgage or pledge of that nature; that being so informed by Sillers, and also having been informed to the same effect from other sources which they believed learned in the law, appellants considered and believed said statement in the agreement as of no lawful effect, and that Sillers waived the same; and that they accepted Graham's draft, which has been paid.

That on the 11th February, appellants entered into a contract, in writing, with Graham, to furnish stock, farm tools, and provisions, besides accepting the draft for half the rent, making $9,000 for the Asia plantation, in addition to amounts then previously advanced for the same purpose; in consideration of which Graham obligated himself to ship to appellants all the produce of the plantation, to reimburse them for all their advances of every kind, pledging the crop for the payment of the advances, and obligating himself to ship it to appellants as it was ready for market, and to contract no debt or obligation which might interfere with the faithful performance of the contract.

See Exhibit Z, pp. 20, 21.

That during that season the Asia plantation was twice overflowed by the waters of the Mississippi—a fact, by the way, which accounts for the small crop of 49 bales; that on the 1st June, 1867, Graham, being indebted to appellants in the sum of $27,554 for money advanced and supplies, executed a deed of trust, by which he conveyed to William G. Yerger, for the benefit of appellants, all the crops then growing and to be grown during the current year on the Polk, Rawle, Asia, and Egypt plantations, the condition of which was that Graham should pay the debt, and should ship the cotton to appellants, as he had agreed to do, or that, on his failure, Yerger should take posses-

sion, and cause the crops to be shipped, or might sell without legal process.

See Exhibit T, pp. 22, 23.

That Graham voluntarily, and as he was in duty bound to do, shipped to appellants 49 bales cotton, product of the Asia plantation, of which 11 bales belonged to the freedmen employed on the plantation; and that appellants were obliged to pay the balance due the freedmen, in order to discharge their liens and privileges, and to obtain the crop; that after this payment the cotton was openly, and without concealment or fraud, consigned to appellants, as commission merchants, for sale; that in the ordinary and lawful exercise of their rights they sold the cotton in open market; and that it produced the net sum of $2,062.90, as appears by account sales, Exhibit X, (pp. 16 to 19 inclusive,) which sum was placed to the credit of the account of Graham.

That appellants made the advances to Graham as set forth in the three notes. (G. H. I., pp. 23, 24.) That to meet these advances and the payment to the freedmen, Graham, in good faith, as by his agreement and deed he was bound to do, shipped to appellants the forty-nine bales from Asia plantation, and that appellants had a lien and privilege on the cotton of a higher nature than all others, especially appellee.

Appellants deny the right of mortgage, lien, and privilege set up by appellee. They also deny that they ever received any notice of appellee's pretended claims until about the last of November, when they received his letter of 25th November, 1867.

They deny all charges of fraud in the bill; they specially deny that the cotton was removed from the Asia plantation and carried out of the State of Mississippi with intent to

defraud appellee and to defeat his pretended liens; and they also deny that they are liable to appellee, as trustees or otherwise.

There is no proof of the dates at which the cotton was received and sold by appellants, nor of the value, except that furnished by them, (Exhibit X, p. 17, Original, 48,) by which it appears that ten bales were received and sold in October, seventeen in November, nineteen in December, and three in January, and that the net proceeds amounted to $2,062.90. The decree against appellants for $2,146.31 is probably the result of a mere clerical error.

The allegations of the bill and answer, respectively, so far as they depend upon documentary evidence, are established by the exhibits. The statement in the answer as to what occurred at the interview between Sillers and appellants is contradicted by Sillers. No doubt the appellants made the statement in accordance with their understanding and recollection, and that Sillers testified according to his understanding and recollection. The result is a failure to prove that Sillers waived the stipulations in his favor in the contract between himself and Graham.

As appellee claims to have been substituted to Sillers, the first inquiry is as to the character and effect of that part of the contract which he relies upon as a mortgage, which is as follows:

"And the said John H. Graham hereby mortgages and "pledges all the crops raised on said Asia plantation "in the year 1867 to the faithful performance of these cov- "enants, hereby authorizing said Sillers or his assigns, "without legal process, to seize upon and sell the same "for cash," &c., "in case of any failure on the part of said "Graham to perform the said covenants, or either of "them," &c.

Exhibit A. P. 5, Orig., 15.

Certainly this is not in the usual form of a mortgage; and while it is not insisted that any set form is necessary, it seems that some words of conveyance by which title is vested in the mortgagee, with a condition of defeasance, are indispensable. There must be a transfer of the property, a legal title created in the transferree, whatever restrictions may be imposed upon that title by the actual intention and agreement of the parties. The verb "pledges" is without significance, as used in the contract, because it is applicable only to cases in which property is delivered; and it serves to show the intent and to limit the effect of the delivery. The verb "mortgages" is not a word of conveyance. It well describes the purpose of the contract with respect to which it is used, and would serve to characterize a conveyance which might otherwise be an unconditional sale and transfer of the property.

It was admitted that the planting of cotton in Mississippi does not commence before March or April; never before March, and rarely until later.

P. 48; Orig., 139.

At the time this contract was executed, 15th January, 1867, not only was there no crop growing on the plantation, but the seeds had not been planted. The "thing," therefore, was not *in esse;* it had no existence. Was the contract in reference to this expectancy a valid mortgage?

As Sillers says in his testimony, the leasing of plantations in Mississippi was a new business; and the idea of a mortgage of the prospective crops as security for the rent was no doubt equally new. When we remember that this entire plantation, with the benefits of the lease, was sold under execution, and purchased by appellee, the judgment creditor of Sillers, in June, 1867, for $5,000, and that Sillers leased it to Graham for the year 1867 for $7,000, one

half of which he took care to have well secured by the acceptance of a responsible New Orleans house, we may readily understand that he could afford to take very doubtful security for the other half.

I can find no case in the Mississippi Reports bearing upon this question, and the courts of that State, in solving it, would follow the current of English and American authorities.

The cases are collected and reviewed in Hilliard on Mortgages, vol. 2, chap. 42, 4th edition. At page 414, § 12, citing Milliman *vs.* Neher, (20 Barb., 37,) and Comstock *vs.* Scales, (2 Wis., 159,) he says: "So a mortgage "of future crops is held void." And at p. 416, § 18: "A "mortgage was given in January, 1859, of 'all the hay and "'grain that grows on the farm on which I now live, the "'present year:' *Held*, To be good for the hay and win- "ter rye, which were *in esse* at the time of the execution "of the mortgage, but not for the grain crop of the spring "of 1859."

Cudworth *vs.* Scott, 41 New Hamp., 476.

So, in Massachusetts, that which is not *in esse* cannot be mortgaged.

Moody *vs.* Wright, 13 Met., 17.

With respect to after-acquired property, there are certain distinctions. In Massachusetts a mortgage of goods not belonging to the mortgagor at the time, but subsequently acquired, is void against his attaching creditors.

Jones *vs.* Richardson, 10 Met., 481.

In Illinois subsequently-acquired personalty is not covered by a chattel mortgage, (Hunt *vs.* Bullock, 23 Ill., 320,) and property taken in exchange for that which was mort-

gaged cannot be substituted by verbal agreement of the parties so as to be covered by the mortgage.

Rhines *vs.* Phelps, 3 Gilm., 455.

See, to same effect, Gardner *vs.* McEwen, 19 N. Y., (5 Smith,) 123.

In Wisconsin, a chattel mortgage, covering in terms stock afterwards to be acquired and brought into a shop, is not good as a transfer or incumbrance. (Chynoweth *vs.* Tenny, 10 Wis., 397.) Same rule in Maryland.

Hamilton *vs.* Rodgers, 8 Md., 301.

Rose *vs.* Bevan, 10 Md., 466.

See, also, Chapin *vs.* Cram, 40 Maine, 561, to same effect.

In Maine and in New York, where a stock of goods is mortgaged and portions are sold, other goods bought strictly with the proceeds are covered. (7 Shep., 408; 8 Barb., 102.) So, in Connecticut, where a printing establishment is mortgaged and new articles are purchased to supply the place of those that are lost or worn out.

14 Conn., 255.

In Wisconsin, it is said, though a mortgage of personal property cannot of itself, even by express terms, pass after-acquired property, yet if, before the rights of third persons intervene, the mortgagor delivers or conveys the property when acquired, it may be held under the mortgage.

Farmers' *vs.* Commercial, 11 Wis., 207.

See also Chapman *vs.* Weimar, 4 Ohio, (U. S.,) 481.

Walker *vs.* Vaughan, 33 Conn., 577.

In all such cases, however, it is manifest that the mortgagee holds, under and in virtue of a new title, the subsequent agreement and delivery, an executed contract. The

proof of this is the qualification, as stated in 11 Wis., 207, *that no rights of third persons intervene;* and in 33 Conn., 577, *that no others have acquired precedent rights.* The plain meaning of this is, that when the mortgagor of subsequently-acquired property becomes the owner, if he is in such a condition that he can validly transfer and deliver it to whomsoever he pleases, upon a sufficient consideration, then, and not otherwise, he may validly transfer and deliver it to the mortgagee; and the original consideration upon which the mortgage was given will uphold and maintain his title and possession. It cannot be true in any sense that the mortgagee holds under the mortgage which was inoperative and void, *ab initio.*

Subject to the exceptions as stated in 7 Shep., 8 Barb., 14 Conn., the following rules result clearly from the authorities:

1st. The mortgage of a thing not *in esse* is void.

2d. The mortgage of that which does not belong to the mortgagor is void.

3d. When the mortgagor comes into possession and ownership of that which was not *in esse*, or which did not belong to him at the time of the execution of the mortgage, if he can transfer and deliver it to a stranger, he may validly transfer and deliver it to the mortgagee; and the mortgagee will hold, not under the void mortgage, but under the new contract supported by the original consideration.

But if the contract between Sillers and Graham can be treated as a mortgage, the question arises, do the pleadings and the facts established make a case falling within the equity jurisdiction of the circuit court?

By the law of Mississippi, the legal title is in the mortgagee of personal property after breach of the condition.

Revised Code of 1857, p. 308, art. 12; Revised Code of 1871, p. 501, § 2295.

The legal effect of the forfeiture of the condition of a chattel mortgage is to vest in the mortgagee the right to possession and the absolute ownership of the property.

See O'Reilly *vs.* Hendricks, 2 Smedes & Marshal, 388; Thornhill *vs.* Gilmer, 4 S. & M., 153; Petrie *vs.* Wright, 6 S. & M., 647.

By the same law, grantees of lands let to lease, have and enjoy all the covenants contained and expressed in the leases, just as the lessors might have had.

Revd. Code, 1857, p. 342, art. 15; Revd. Code of 1871, p. 337, § 1634.

The rights of Sillers, as expressed in the lease, accrued to appellee on his purchase of the land, 3d June, 1867; and if Sillers was a mortgagee, in virtue of the stipulations of the lease, so that the legal title would have been in him after the breach, the legal title was in appellee; he was absolute owner, by operation of law, after the breach. As the right of Sillers vested in appellee by operation of law, he was included in the terms of the agreement between Sillers and Graham, which authorized Sillers, or his "assigns" to take possession and sell without legal process. So that the ownership and the right to immediate possession were in appellee by the effect of the law, as well as by the express terms of the contract.

Exhibit A, p. 5; Orig., 15.

Where the holder of the legal title, the absolute owner, is also entitled to immediate possession, he may follow the property, and by appropriate action at law may recover it from the wrongful possessor, or may recover the value from him who has unlawfully converted it to his own uses.

It will be observed that the appellants set up no claim of ownership to the cotton. They were the factors and

agents of Graham, and in that capacity they received and sold the cotton as the property of Graham and for his account. They were accountable to him for the proceeds; but as he owed them a much larger amount, that accountability ceased, and his indebtedness to them was extinguished *pro tanto* when they carried the proceeds to his credit, unless there existed some legal obstacle to this application of the proceeds. Nothing short of a right in some other person which had attached to and followed the cotton into the hands of the factors, and which was superior in rank and privilege to the lien of the factors, could have constituted such an obstacle. In such case, and in such case only, the money would remain in the hands of the factors, subject to such superior right; and it would be money had and received by the factors for the use and benefit of the person having such superior right.

The entire conduct of appellee, particularly the significant fact that he accepted the account sales and statement of amount as exhibited by the appellants, and offered no other proof whatever of value, indicates plainly his purpose to limit his demand to the proceeds, the sum actually realized and received for the cotton. The case which he relies upon, the only case which he attempts to make, is that he is entitled, *ex æquo et bono*, to that sum of money; and this is a right to which the action at law for money had and received is peculiarly appropriate; an action which does not look to the origin of the right, but simply to the question whether the plaintiff ought, in equity and good conscience, to have the money which the other has received.

There is no material allegation in the cause, there is no fact proven, which might not have been set forth in a proper declaration in an action at law, and proven before a jury by the same means and instrumentality, whether the

appellee had elected to limit his demand to the sum actually received by appellants, or whether he had chosen to proceed for a larger sum, the supposed value of the cotton.

In any aspect of the case, if the appellee can recover of appellants upon the allegations and proof in the cause, he could equally as well recover and would have as complete and perfect a remedy at law: and the circuit court was without jurisdiction as a court of equity.

It is respectfully submitted that if the cause is of equity jurisdiction, Graham and Sillers were necessary parties.

In his letter of 25th November, 1867, (Exhibit E, p. 11, Orig. 28,) appellee alludes to the landlord's lien, although in his bill he relies solely on his alleged right as mortgagee. By the law of Mississippi the landlord has no lien. He may attach and prevent the removal of the property from the leased premises, and he may proceed by distress. There is nothing in the relation of landlord and tenant which impairs the absolute ownership of the tenant, or deprives him of the right to remove, or to sell, or to mortgage or otherwise incumber the goods, unless prevented by attachment or distress.

See Rev. Code, title Landlord and Tenant.
Marye *vs.* Dyche, 42 Miss., 347.
Stamps *vs.* Gilman, 43 Miss., 456.

The cotton certainly came into possession of the appellants free from any claim of the landlord as such; and there was nothing tortious in the removal and shipment to appellants. Sillers knew from the beginning that appellants were the factors of Graham, and that they were making him large advances on the faith of the crop. Graham told him the advances were to be upwards of $20,000, (p. 31; Orig., 86.) Appellee is charged with this knowledge, as the assign of Sillers; and they both knew that, in

the ordinary course of business, Graham would ship the crop to appellants from time to time, as it might be gathered and prepared for market, and that appellants would sell it for their reimbursement. Sillers was on the place in November, as the agent of appellee, to collect the rent note, and he knew then that the cotton was going forward to appellants. No doubt he communicated this fact to appellee. Up to the 20th November, 27 bales, the number mentioned in appellee's letter of 25th November, had been shipped, and the remainder was shipped so as to reach appellants 16th and 17th December and 16th January. And yet no attempt was made by appellee to exercise his right, as mortgagee or landlord, upon the property itself, nor to prevent the shipment and sale of the cotton, running through a period of nearly three months.

Indeed, in appellee's letter of 25th November, he makes no objection to the sale of the cotton. On the contrary, he tells appellants that he will look to them, not for the cotton itself, but for the value, which necessarily presupposes a conversion of the cotton into money.

If it be said that appellants had knowledge of the mortgage claim set up by appellee, it may be answered that they did not not consider it valid; and that the best legal authorities hold it to be void as a transfer, or as a lien or incumbrance on the cotton, which was not *in esse* at the date of its execution. It is not necessary to inquire what might have been the right of the appellee if Graham had delivered the cotton to him in Mississippi, or if he had proceeded against it while it was in the possession of Graham, since no attempt was ever made by appellee to obtain possession.

The cotton, therefore, came into the hands of appellants free from any lien except their own. It was shipped to them by Graham in accordance with the contract of 11th

February, 1867, (Exhibit Z, pp. 20, 21, orig. 54–56,) and the deed of trust of 1st June, 1867, executed at a time when the crop was *in esse* growing, (Exhibit T, pp. 22, 23, orig. 58–61,) both recorded in Bolivar county.

By the law Merchant, and the special law of Louisiana, the factor has a lien on the goods consigned to him for his advances; and the bill of lading vests in him the possession and the power of control. (Civil Code, art. 3184, and amendment, act of 1843, incorporated in all subsequent editions of the Code.)

In point of equity the position of appellants is at least equal to that of appellee. Appellants had paid half the rent, seventy per cent. of the price paid by appellee for the property, with the accruing rent; and they had advanced large sums to the tenant beside, without which no crop could have been grown on the place.

It is respectfully submitted that the decree is not supported by the pleadings and proof; and that it should be reversed and the bill dismissed.

R. H. MARR,
For Appellants.

WASHINGTON, *February* 18, 1874.

Since the foregoing was in print my attention has been called to the Statute of Miss. approved 18. Feb. 1867 authorizing the mortgage of future crops. This statute cannot affect a pre-existing contract not pre-existing rights but it confirms the argument that at the date of the execution of the contract relied on a mortgage of a crop not in esse was not susceptible of mortgage.

Marr.

Supreme Court of United States.

No. 238.

CARY W. BUTT ET ALS.

VERSUS

HENRY T. ELLETT.

Brief on behalf of Appellants.

CLARK & HOFELINE, PRINT, 9 BANK PLACE, NEAR GRAVIER, N. O.

Supreme Court of the United States.

No. 284.

CLARA W. BRETT ET AL.,

vs.

HENRY T. BLEDSOE ET AL.

Brief on behalf of Appellants.

Supreme Court of United States.

No. 238.

CARY W. BUTT ET ALS.

VERSUS

HENRY T. ELLETT.

Brief on behalf of Appellants.

The complainant (appellee,) filed a bill against the defendants, (appellants,) as trustees for him of a crop of cotton, the growth of 1867, of the Asia plantation, in Mississippi. The plantation was rented by Sillers, the then owner, to Graham, January, 1867. The lease stipulated for a mortgage, and pledge of the crops of 1867, to be effectuated by seizure and sale without legal process. The title of Sillers in the plantation was acquired by appellee under a Sheriff's sale. The rent note is alleged to have been transferred afterwards by Sillers to appellee. The crop or a portion, was consigned by Graham to appellants who sold it, and applied the proceeds to the credit of Graham's account for advances in which he was largely indebted to them as Commission Merchants, at New Orleans.

The complainant charges the defendants with knowledge of the lease. They admit and aver the facts to be that Sillers and Graham came to their office in New Orleans, in February, 1867, and both exhibited the lease to them, that at the time being about to aid Graham in the furnishing of supplies to him, to enable him to cultivate several plantations, they called the attention of Sillers to that portion of the agreement, wherein Graham mortgaged and pledged all the crops raised on said Asia plantation in 1867, and objected to the same. Whereupon Sillers stated in substance, that the laws of Mississippi did not authorize a mortgage or pledge of that nature. That being so informed by Sillers, and otherwise, they considered that said agreement therein was of no effect, and that said Sillers waived the same. (Answer p. 32.) Sillers being examined as a witness, does not recollect the conversation. The Court *a qua* rendered a decree against the defendants, assigning reasons orally.

ASSIGNMENT.

The Court *a qua* erred.

1st. In regarding the appellants as trustees, for complainant.

2d. In assuming that the crop was subject to either a legal or equitable mortgage in his favor.

ARGUMENT.

By the laws of Mississippi no lien or privilege exists in favor of the landlord, except such as arise out of distress, or attachment auxiliary to a distress.

Stamps vs. Gilman & Co., 43 Miss. 456.

Meyer vs. Dyche, 42 Miss.

The crop of 1867 was not susceptible of sale or mortgage in January, 1867. The seed was not in the ground. Planting could commence at the earliest in March—Admission, page 139. The crop had no potential existence. The land had no power of itself to bring forth cotton. The *seed* was the essential potential agency to produce cotton. This differs from the existence of a crop of hay, or a fleece of sheep. The roots of the former are either natural to the soil or may be perennial. The fleece is a necessary consequence of the natural healthful existence of the sheep.

After this lease was made the Legislature passed an act approved Feb. 18, 1867, Session Laws, page 569, entitled an act for the Encouragement of Agriculture.

SEC. 1. *Be it enacted by the Legislature of the State of Mississippi*, That all debts hereafter contracted, for advance of money, purchase of supplies, farming utensils, working stock, or other things necessary for the cultivation of a farm or plantation, shall constitute a prior lien upon the crop of cotton, corn and other produce of such farm or plantation, which is not by law exempt from levy and sale by virtue of execution, and also on the animals and implements employed or used in cultivating the same, which shall have been purchased with the money so advanced, or which shall have been furnished by such person, in favor of the person or persons so advancing or furnishing as aforesaid, from the time the contract or con-

tracts therefor or a synopsis of the same shall be enrolled as hereinafter provided.

SEC. 7. *Be it further enacted*, That it shall be lawful to convey by way of mortgage or deed of trust, any crop of cotton, corn or agricultural product, being produced or to be produced within fifteen months from the date of such mortgage: Provided, that nothing in this act shall interfere with any prior lien granted by the provisions of this act, for supplies and means furnished to grow the crop.

SEC. 8. *Be it further enacted*, That nothing in this act contained shall affect any of the rights or remedies now allowed by law of the landlord for rents due or owing for any plantation or farm.

Under the provisions of this act appellants acquired a lien upon this crop in contestation, by virtue of a deed of trust, duly recorded. Page 58 et seq.

Can this right, by law accorded, be made subordinate to any equitable right of Sillers? We contend not.

The averments of the answer are affirmative, distinct and positive. They are not contradicted by Sillers. His statements are merely negative of remembrance. The bill calls for a disclosure of the facts of knowledge of the lease. The answer states the circumstances attending the communication of the fact of the lease—they are necessary attendants, and the whole must be taken together.

But while contingent interests and expectancies may be made the subject of contract in equity, they will be enforced, not as a trust attaching to thing, but simply as a right of contract.

2 Story's Eq. 1040, *b*.

And by the terms of this lease the right to rent was to be effectuated by seizure and sale. There is no doubt that a mere assignment will not pass after acquired property, and therefore the power was granted to seize and sell.

This case presents the features of Carr vs. Allatt; Hurlston & Norman, 8 Exchequer Reps. 964, Am. Ed., except, that in that case the crops had been seized under the power, and so the seizure maintained.

The cases 23 Howard, 117 and 2 Story, 630, and those referred to therein, are distinguishable upon principle. A contract had been made which, between the parties, had become executed by the property coming into possession of the mortgagor, before other rights attached. The claims arose subsequent thereto.

Here then is a contract between Graham and Sillers, and nothing more.

But there is another view of this subject. The cotton was openly shipped from Mississippi to New Orleans. There was neither fraud nor concealment. Diligence and activity to obtain that which had been pledged to them, were the characteristics of appellants' actions. The cotton was lawfully in Louisiana. It was lawfully sold. The proceeds were applied to the partial payment of a lawful obligation. They were not bound to pay the rent, nor were they bound to apply the cotton thereto. They did nothing to lull the landlord, or prevent his exercise of his right of distress.

The laws of Louisiana are to be applied to the subject.

Personal property was not at the time susceptible of mortgage. 1 Hennen's Dig. 937.

Pledges are unavailing unaccompanied by possession. Delivery is the essence of pledge. 2 Hennen's Dig. 1190; C. C. 3119.

Privileges are local, governed by *lex fori*. Louisiana laws protect the appellants against any and all foreign claims, except absolute right of property. Lee vs. His Creditors, 2 A. 599.

The appellants ask for a reversal of the decree *a qua*, and a decree dismissing the bill of complaint.

THOS. ALLEN CLARKE,
For Appellants.

IN THE

Supreme Court of the United States

NO. 238.

BUTT, FLASH & LYON, Appellants,

VS.

HENRY T. ELLETT, Appellee

BRIEF OF ESTES, JACKSON & ELLETT

FOR APPELLEE.

IN THE

Supreme Court of the United States.

BUTT, FLASH & LYON, Appellants,
vs.
HENRY T. ELLETT, Appellee.

NO. 238.

BRIEF FOR APPELLEE.

This is an Appeal from the decree of the Circuit Court of the United States for the District of Louisiana, in equity, given in favor of the appellee, Ellett, who was complainant below, against the appellants, who were defendants below, for the sum of $2146 30, with interest from November 1, 1867—being the proceeds of forty-nine bales of cotton grown on the Asia Plantation, and upon which the appellee claimed to have a lien by mortgage.

The case is as follows: W. Sillers, the owner of the Asia Plantation, in Bolivar County, Mississippi, leased the same to John H. Graham for one year, commencing January 1, 1867, for the rent of seven thousand dollars, payable one-half on the first day of October, and the other half on the first day of November, 1867. For the first installment Graham gave a bill of exchange accepted by the appellants, which was paid at maturity, and for the second he gave his own note payable to Sillers, for $3500, which note remains wholly due and unpaid.

Graham covenanted to pay the rent promptly at the maturity of the draft and note, and embodied in the lease a mortgage and pledge of all the crops raised on said plantation in the year 1867, as security for the faithful performance of this covenant. The non-payment of the note given for the last installment is the occasion of this suit.

See the lease, (Record, p. 5); the note, (p. 6); and testimony of Sillers, (p. 28).

On the 3d of June, 1867, Ellett, the appellee, purchased the Asia Plantation at a sheriff's sale, made under a judgment recovered by him against Sillers, who, recognizing the effect of this change of ownership as entitling Ellett to receive the rent thereafter becoming due from Graham, transferred to Ellett the said note of Graham for $3500, due November 1, 1867, representing one-half of the rent to be paid for the plantation.

See sheriff's deed, (p. 7), and record of judgment, (pp. 8, 9 and 10).

By virtue of the sheriff's sale, and the assignment of the note to Ellett, he acquired all the rights vested in Sillers under the lease and mortgage, and as payee and holder of said note—that portion of the rent not being due at the date of the sheriff's sale, but becoming payable thereafter.

The right to the rent of real property is necessarily dependent on the title. When the title passes, the right to the rent thereafter to become due, passes with the title

Rent is *incident* to the *reversion*. It is not due till the day of payment, and to what becomes due on that day, the owner of the reversion is entitled.

2 Co. Litt., p. 323, Note A; p. 326, Note F, and p. 377, (151 b);
Taylor Land. and Ten., 292, 3, §§ 446, 447;
Comyn Land. and Ten., 262;
Rev. Code of Miss. of 1857, p. 342, art. 15.

A sale by a sheriff under execution will pass the accruing rent to the purchaser, as assignee of the reversion.

Boorell vs. Dewart, 37 Pa. St., 134;
Taylor Land. and Ten., secs. 440, 441, 616.

Ellett, by his purchase, became the assignee of the covenants of Graham contained in the lease, and entitled to all the remedies which

Sillers had for their enforcement, and to the benefit of the mortgage on the crops for that purpose.

A mortgage is a mere security, and is an incident to the debt.

Green vs. Hart, 1 Johns., 590;
Hutchins vs. King, 1 Wallace, 58;
2 Gallison, 154, 5; 4 Johns., 43;
11 Johns., 534; 19 Johns., 325;
3 Johns. Chan., 322; 9 Verm., 299.

In Mississippi, where all these transactions took place, it is well settled that the assignment of a note secured by a mortgage, carries the mortgage with it, as an incident to the note.

Tanner vs. Hicks, 4 Smede's & M., 300;
Terry vs. Woods, 6 ib., 149;
Dick vs. Maury, 9 ib., 456;
Henderson vs. Herrod, 10 ib., 633;
Bush vs. Cooper, 26 Miss., 599.

The appellants, Butt, Flash & Lyon, had express notice of this mortgage, and in all their transactions with Graham they had special reference to it, as a prior lien on the crops. Graham sent to them at New Orleans, by the hands of Sillers, a duplicate of the lease containing the mortgage, and it was delivered to them by Sillers on the *sixth* day of *February*, 1867, two days after it was acknowledged, and before it was put on record.

(See pages 28 and 37 of Record).

Notice of an unregistered conveyance is equivalent to registration.

4 Kent's Com., 190, 533 (456) marg.;
2 White & Tu. Lead. Cas., part I, p. 130; notes to LeNeve vs. LeNeve;
Patterson vs. De LaRonde, 8 Wallace, 299, 300.

Besides, the lease and mortgage were actually recorded in the proper office in Bolivar County, Miss., on the 25th of April, 1867, which from that date, was, by operation of law, notice to all the world.

(Record, p. 6).

Rev. Code of Miss. of 1857, p. 310, art. 21, 22.

The crop proved to be almost a total failure, by reason of high water in the spring, and the army worm in the fall. The share of

Graham, after paying the laborers, was only forty-nine bales, not enough to pay one-half the rent. The appellants, having accepted Graham's draft for $3500, and claiming to have made advances to a large amount, sent to the plantation in September, 1867, an agent by the name of Ruhle, under whose direction and superintendence the forty-nine bales were obtained from Graham, and shipped to the appellants at New Orleans, who received the cotton, sold it, and appropriated the proceeds to their own use.

The agency of Ruhle is indeed denied by the answer, but the proof shows beyond controversy that he was sent to the plantation by appellants, with full written powers, and for the precise purpose of getting possession of the crop. Moreover, it is quite sufficient for the complainant's case that they received the cotton through the instrumentality of Ruhle, and appropriated it, with full knowledge of the prior equitable lien upon it existing in favor of the complainant.

As soon as these facts came partially to the knowledge of the appellee, he promptly asserted his rights, and demanded the proceeds of the cotton.

(See Exhibit E, page 11).

And it is for the proceeds of these forty-nine bales that the decree of the Circuit Court makes the defendants liable, on the basis of their own accounts of sales exhibited with their answer.

This decree is a simple affirmance of the plain principle, that he who receives and applies to his own use, property subject to a mortgage or lien in favor of another, with notice of such lien, will be deemed a trustee to the extent of the lien, and will be bound to the mortgage or lien creditor for the property or its proceeds. In other words, a purchaser with notice is bound by all equitable liens, and is a trustee to the extent of such liens.

1 Story's Eq. Ju., § 395;
2 ib., §§ 1231, 1257;
2 White & Tudor's Lead. Cas. Eq., part I, pp. 97, 129;
1 Sanders Uses and Trusts, 348, 349;
Legard vs. Hodges, 1 Ves., jr., 478;
Collyer vs. Fallon, 1 Turn. & Russ., 469;
Calhoun vs. Burnett, 40 Miss., 604, 5.

The appellants seek to escape their just liability by calling in question the validity of such a mortgage upon crops yet to be grown.

Such an objection comes with a bad grace from them for two reasons:

1. Because, on the 11th of February, 1867, only five days after they had read and examined the lease containing the mortgage to Sillers, they themselves took from Graham a similar mortgage and pledge of the same crop, and of the crops of two other plantations, not yet planted, to secure advances which they proposed to make to Graham, which mortgage they put on record in Bolivar County, on the 19th of June following, (Exhibit Z, pp. 20, 21); and on the first of June, took an additional deed of trust on the same crops. And,

2. Because all their advances to Graham, and liabilities incurred for him, were made and entered into after a careful examination of the lease between him and Sillers, and with full knowledge of the prior lien on the crop in favor of Sillers. Having failed to object to its validity then, it is a fraud to attempt to impeach it now.

But, notwithstanding some want of harmony in the authorities, it is believed to be the settled doctrine, especially in the courts of the United States, that such a mortgage is perfectly good. When the parties intend to create a lien upon property not then in actual existence, it attaches in equity as soon as the person who grants the lien acquires the property. In this case, the making of the crop was the end and object of the lease, and it was the express intention of both parties that the lessor should have a lien upon the crop to be grown, as security for the payment of the rent. The validity of such a mortgage is believed to be unimpeachable.

Pennock vs. Coe, 23 How., 117, and cases cited;
Dunham vs. Railway Co., 1 Wallace, 254;
Robinson vs. Mauldin, 11 Alabama, 980;
Bryan vs. Smith, 22 Ala., 534;
Floyd vs. Morrow, 26 Ala., 353;
Curtis vs. Auber, 1 Jac. & W., 510;
Mitchell vs. Winston, 2 Story Rep., 630;
2 Kent Com., 625, (468), note;
2 Hilliard on Mort., 381, § 7;
Smithurst vs. Edmunds, 1 McCarter N. J., 408.

This doctrine recently affirmed in Mississippi — Sillers v. Lester 48 Miss R. 513

The case of Tedford vs. Wilson, 3 Head. (Tenn.), 311, is in point. An agreement was made with an overseer, on the 8th of January, and "*the proceeds of the farm*" were declared liable for his wages. This was held to make the *future products* of the farm, not *then* in existence, first liable to the payment of the overseer's wages, in preference to judgment creditors of the debtor, and that too without registration or actual notice.

In Welsh vs. Bekey, 1 Penna., (by Rawle, Penrose and Watts), 57, and in Robbins vs. Parker, 3 Metcalf, 117, growing crops were mortgaged, and the mortgages were held invalid, *as to creditors*, and not on the ground that such property was not capable of being mortgaged, but because the possession, control and disposition were reserved to the mortgagor; a difficulty that does not exist in the present case.

There can be no reason for making the fact of putting the seed in the ground, the criterion of the right of disposition of the expected crop. The lessee of the land for the purpose of cultivation, has a possession as *potential* the day before the seed is planted as the day after.

It is settled that in equity, rights in remainder and reversion, *possibilities coupled with an interest*, expectancies, contingent interests, possibilities of trusts, &c., are capable of being mortgaged or sold.

1 McCarter, 408;
2 Story's Eq., §§ 1021, 1040, 1040 b.

Some other points made in the answer demand a brief notice.

1. It is averred that Sillers, in his interviews with appellants in February, 1867, waived his lien on the crops.

This is affirmative matter in defense, not responsive to any allegation of the bill, and is wholly unsupported by proof. In truth, it is fully disproved by the testimony of Sillers and Graham, and the averment is destitute of any foundation in fact.

2. It is alleged that the appellants made large advances to Graham, to enable him to make crops on three plantations rented by him; and the mortgage of Feb. 11, 1867, already referred to, given to secure

advances to be made, and a deed of trust and three notes dated June 1, 1867, purporting to be made by Graham for advances received by him, are set forth, whereby the same crops, "to be grown and gathered," are mortgaged and conveyed in favor of appellants.

All this is likewise affirmative matter, and is not sustained by any competent proof, admissible against the appellee. The notes of Graham are not evidence, and would not be, even if their execution had been proved; for they are "*res inter alios*," and stand on no better footing than any other unsworn declarations of Graham. The mortgage and deed of trust, being acknowledged according to the law of Mississippi, are evidence that Graham executed such documents, but they do not, as against the appellee, prove the truth of the recitals contained in them.

Besides, they are only mortgages of the same ungrown crop, and therefore cannot be any better in this respect than the mortgage to Sillers; and being subsequent to it in date and in registration, and made after full notice and knowledge of it, no rights of the appellants growing out of the alleged advances, or arising from the agreement and deed of trust, can have the slightest effect upon the rights of the appellee, which are "*prior in tempore, et potior in jure.*"

We submit that the decree appealed from should be affirmed.

ESTES, JACKSON & ELLETT,
Counsel for Appellee.